

DRUG AND ALCOHOL TESTING

HEARING

BEFORE THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

FIRST SESSION

ON

S. 561

TO PROVIDE FOR TESTING FOR THE USE, WITHOUT LAWFUL
AUTHORIZATION, OF ALCOHOL OR CONTROLLED SUBSTANCES BY THE
OPERATORS OF AIRCRAFT, RAILROADS, AND COMMERCIAL MOTOR
VEHICLES, AND FOR OTHER PURPOSES

JUNE 15, 1989

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DRUG AND ALCOHOL TESTING FOR TRANSPORTATION EMPLOYEES

THURSDAY, JUNE 15, 1989

**U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
Washington, DC.**

The subcommittee met at 9:30 p.m., in room SR-253, Russell Senate Office Building, Hon. Ernest F. Hollings [Chairman of the Committee] presiding.

Staff members assigned to this hearing: Robert Holleyman, staff counsel; Steve Palmer, professional staff member; Geri Hall, minority professional staff member; and Alan Maness, minority staff counsel.

OPENING STATEMENT BY THE CHAIRMAN

The CHAIRMAN. The committee will come to order.

Today's hearing is the fourth consecutive year that we have been focusing on the problem of drug and alcohol abuse in transportation.

In each of those four years, this Committee has held hearings on the extent of drug and alcohol abuse and the need for legislation to ensure the safety of the traveling public. Time and again, we have heard testimony on the absolute need for mandatory random testing as a necessary means of ensuring deterrence.

Twice during the 100th Congress, the Senate adopted legislation mandating random drug and alcohol testing for safety-sensitive employees in the rail, motor carrier, and commercial airline industries. Support was overwhelming, as the provisions of our bill were adopted on an 87-3 vote in late 1987, and without debate during consideration of the omnibus drug bill late last year. Both times, however, our efforts were stymied by our colleagues in the House of Representatives who opposed drug and alcohol testing or sought to impose conditions on our bill that would have seriously undermined its effectiveness.

Its impossible to ignore the presence of alcohol and illegal drugs in the transportation workplace. The facts speak for themselves. This year alone, there have been 9 rail accidents in which either alcohol or drugs were found to be present in employees responsible for safe passage. Last year, on average, there was a rail accident in which drugs or alcohol were involved every twelve and one-half days. And we cannot forget the tragic January, 1987 accident in Chase, Maryland in which an engineer's use of marijuana was the probable cause for an accident between a Conrail freight train and

an Amtrak passenger train that resulted in 16 fatalities and 174 injuries.

Other examples show this is not an isolated problem:

In 1986, an insurance industry study found that 30 percent of some 300 truck drivers randomly sampled tested positive for drugs.

Investigators determined that a pilot's cocaine use was a contributing factor in a January, 1988 crash of a commuter aircraft in rural Colorado in which nine people died.

In April, 1987, a bus struck a bridge on the George Washington Parkway in Virginia, killing one and injuring 32 passengers. The driver tested positive for cocaine, valium, and marijuana.

The grounding of the *Exxon Valdez* earlier this year in Prince William Sound, Alaska, in which the captain's history of alcohol use is at issue, rings vividly in our minds.

Fortunately, our efforts have borne some fruit. Last year, the Department of Transportation issued rules mandating testing of safety-sensitive workers for illegal drugs in the rail, motor carrier, aviation, maritime, pipeline, and mass transit industries.

However, enactment of legislation to mandate drug and alcohol testing for transportation workers remains my objective and top priority. Very simply, the DOT rules do not go far enough, failing to include alcohol in industry testing programs. Accident statistics prove alcohol abuse a threat to the safety of the American traveling public at least as big—if not big bigger—than illegal drugs. For example, over a 7-year period, the Department of Transportation found 10,300 individuals who had previously had their drivers licenses suspended or revoked for driving while intoxicated became certified pilots. Clearly alcohol is an issue that necessitates our action.

Secondly, the DOT rules lack the statutory backing that regulations of this importance must have. Without having such statutory backing, the existing drug testing rules are subject to the whimsical interpretations and revisions of future DOT Administrations.

The legislation that I introduced, with the strong support of our Ranking Member, Senator Danforth, will accomplish these objectives. It will mandate random and other types of testing for both illegal drugs and alcohol. And it protects the rights of those tested by incorporating guidelines established last year by the Department of Health and Human Services on laboratory accuracy, as well as protections for individual privacy and innocent employees.

I am heartened by the recent Supreme Court decisions on drug testing—both on the constitutionality of Federal Railroad Administration post-accident testing of rail workers, and Customs Service requirements for drug screening of certain workers seeking promotions in the Service. I have long been convinced that given the compelling need for public safety, carefully crafted testing programs would be found to within the limits of the Constitution.

The key component of our present drug testing effort is random testing. Without it, we do not have the deterrence needed to stop drug and alcohol abuse. Experience has established this as fact. For example, the Coast Guard has seen its rate of positive tests drop from 10.3 percent in 1983 when random testing was initiated, to 2.8 percent in 1988.

Call it intimidation. Call it whatever you will. But the fact is that random testing is the only method we have to reasonably ensure that transportation employees will not use drugs on the job.

Right to the point, if you drink alcohol and use illegal drugs, you have no business operating a train, plane, truck, or bus. You have no business assuming responsibility for innocent lives. I hope that this hearing brings us a step closer to enacting this legislation.

I would yield to our ranking member.

OPENING STATEMENT BY SENATOR DANFORTH

Senator DANFORTH. Mr. Chairman, you have been a stalwart in this area, and I want to compliment you not only for holding this hearing, but for your perseverance in dealing with this issue through the years.

As you have pointed out, this legislation has twice passed the Senate only to founder in the House of Representatives. We are willing to do business, just make us a reasonable proposition; we are willing to look at it because we have to legislate.

We have had hearing after hearing where a compelling case has been made that without testing, particularly random testing, there can be no effective drug prevention program in our transportation industry.

So, the evidence is compelling. We will be gathering yet more evidence today on that subject. Also, it is clear that testing passes constitutional muster: The Supreme Court has spoken. My hope is that we can get on with it.

Now, one thing that I do not want to do, though, in the name of getting on with it is to compel the Department of Transportation to rewrite regulations that have already been found adequate by the Supreme Court of the United States. To do that would be to simply throw a monkey wrench in the process of drug and alcohol testing.

There is a second thing that I would hope that we would avoid. The proposal for mandatory reinstatement of people who have flunked drug and alcohol testing would, it would seem to me, simply create a federal right of employment for people who have used drugs or alcohol on the job.

Mr. Chairman, thank you very much.

I have a statement that Senator Inouye would like to have included in the record.

[The statement and bill follow:]

OPENING STATEMENT BY SENATOR INOUE

Mr. Chairman, I rise in opposition S. 561 which would require mass random drug and alcohol testing of our nation's transportation employees. This measure is neither reflective of previous jurisprudence nor in the best public interest of this nation. Our Founding Fathers intended the Fourth Amendment to protect against unreasonable searches and seizures. S. 561 would all but swallow up the Fourth Amendment's right to privacy protections.

The two most recent U.S. Supreme Court decisions in the area of drug testing are *National Treasury Employees Unions v. von Raab*, 109 S. Ct. 1385 (1989) and *Skinner v. Railway Labor Executives Association*, 109 Ct. 1042 (1989). In *National Treasury Employees Union*, the Court held that U.S. Customs agents who applied for promotions to positions involving front-line drug interdiction requiring the carrying of a firearm would be subject in random, suspicionless drug testing. The employees were on notice; if they wanted to be considered for a promotion, they would be required

to submit to a random drug and alcohol test. The High Court upheld the testing by a narrow vote of 5-4.

In *Skinner*, the Court ruled that post-accident testing of transportation employees involved in a serious train accident could be performed without reasonable suspicion that a particular crew member was under the influence of drugs or alcohol. Basically, the accident was deemed to constitute reasonable suspicion sufficient to outweigh an employee's 4th Amendment right to privacy in this situation. Both cases allow drug testing in certain limited situations where the Court concluded that the public safety interests outweighed the diminished expectations of privacy. S. 561 goes far beyond the limited holdings of these two cases.

The essential purpose of the warrant requirement is to protect our privacy interests by assuring citizens subject to a search of seizure that such intrusions are not random or arbitrary acts. See *Skinner*, 109 S. Ct. at 1415; that the intrusion is authorized by law, e.g., *New York v. Burger*, 482 U.S. 691, 703 (1987); that it is narrowly limited in its objectives and scope, e.g., *Camara v. Municipal Court*, 387 U.S. 523, 532 (1967); and that there is an objective determination whether an intrusion is justified, e.g., *United States v. Chadwick*, 433 U.S. 1, 9 (1977).

The *Skinner* Court held that a warrant was not necessary because both the circumstances justifying toxicological testing and the permissible limits of such intrusions were defined narrowly and specifically in the regulations authorizing the tests, and that there was not room for administrative discretion. 109 S. Ct. at 1415-16. The same may be said in *von Raab*, 109 S. Ct. at 1391, where the employees were on notice that the promotion to a drug interdiction position was contingent on passing a drug test. Only those interested employees would be tested which removed the administrative discretion. The Court, in these narrow circumstances, dispensed with the warrant and reasonable suspicion requirements. However, S. 561 calls for mass drug and alcohol testing of transportation employees based upon administrative discretion without sufficient safeguards to ensure against its abuse.

S. 561, if enacted, would allow for preemployment, periodic recurring, random and post accident drug and alcohol testing of all employees performing safety sensitive functions. The measure also accords the Secretary the discretion to determine who performs safety sensitive functions. Additionally, the percentage of employees that will be randomly tested annually is also left to the Secretary's discretion. This goes far beyond the scope of all previous jurisprudence in the area of random drug and alcohol testing.

Even if we agree to disagree on the constitutionality of random drug testing, there are other problems which plague S. 561. First, and probably most important, S. 561 does not require mandatory rehabilitation for workers who test positive. Rather, it is left to the Secretary's discretion, I believe that the individual who tests positive should be given some opportunity to rehabilitate him/herself. It is the easy way out to say, "Fire them, we do not need drunks." But realistically, and as the High Court emphasized in both of its decisions, we should be striving to help the victims of drugs and alcohol, not punish them. They may have families to support and may need a helping hand to pull their lives back together. Isn't it a wiser policy to rehabilitate them, rather than have them added to our welfare rolls?

The majority of collective bargaining agreements in the transportation industry already require some form of drug and alcohol testing, as well as provide for mandatory rehabilitation programs for those who test positive. It seems that to leave to the Secretary's discretion whether rehabilitation should be required undermines these agreements which management and labor currently have in place.

Another area of concern is the lack of a provision informing the employee of his/her right to relief if the privacy guarantees are violated. One particular area of concern is an employer's use of the additional medical information contained in the blood and urine. These fluids reveal the existence of a history of venereal disease, epilepsy and susceptibility to heart disease and strokes which may be used against the employee. While there is a provision to protect an employee's privacy regarding the use of medical history, if there is no remedy made available for the violation thereof, it is an empty protection. Additionally, S. 561 does not set forth any procedures that an employee may follow if he/she desires to challenge the positive test result. The stigma associated with a false positive test result could ruin an employee's career. Yet, S. 561 is silent on an employee's recourse in such a situation. It fails to even direct the Secretary to so promulgate.

I cannot agree with the rhetoric that only drug abusers and drunks would fear or find random drug and alcohol testing repugnant. Rather, we have an obligation to consider the interests and rights of all employees. I do not believe that the government's interest in protecting public safety, however important it is, justifies enact-

ing legislation to mandate mass random drug testing of transportation workers without reasonable suspicion.

My concern is where we go from here. Statistics evidence that many, many more deaths are caused every year by drivers on our highways than in rail, bus and plane accidents combined where drugs or alcohol are involved. Will we next consider legislation requiring the seizure of urine samples at road blocks, or worse yet, randomly test our nation's automobile drivers or require a urine sample before issuing a driver's license?

Even in light of *Skinner* and *von Raab*, I have serious doubts as to whether S. 561, as drafted, will withstand constitutional scrutiny. I urge my colleagues to consider these many unresolved issues before voicing their support for S. 561.

101ST CONGRESS
1ST SESSION

S. 561

To provide for testing for the use, without lawful authorization, of alcohol or controlled substances by the operators of aircraft, railroads, and commercial motor vehicles, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MARCH 9 (legislative day, JANUARY 3), 1989

Mr. HOLLINGS (for himself, Mr. DANFORTH, Mr. EXON, Mr. BREAUX, Mr. BURNS, Mr. GORTON, Mr. LOTT, Mr. BOND, Mr. BOSCHWITZ, Mr. COATS, Mr. D'AMATO, Mr. DECONCINI, Mr. DOLE, Mr. GRAMM, Mr. LUGAR, Ms. MIKULSKI, Mr. MCCAIN, Mr. MCCONNELL, Mr. GRASSLEY, Mr. HELMS, Mr. SARBANES, Mr. WALLOP, Mr. WABNER, Mr. WILSON, and Mr. CHAFEE) introduced the following bill; which was read twice and referred to the Committee on Commerce, Science, and Transportation

A BILL

To provide for testing for the use, without lawful authorization, of alcohol or controlled substances by the operators of aircraft, railroads, and commercial motor vehicles, and for other purposes.

- 1 *Be it enacted by the Senate and House of Representa-*
- 2 *tives of the United States of America in Congress assembled,*
- 3 That (a) the Congress finds that—
- 4 (1) alcohol and drug abuse poses significant dan-
- 5 gers to the safety and welfare of the Nation;

1 (2) millions of the Nation's citizens utilize trans-
2 portation by aircraft, railroads, trucks, and buses, and
3 depend on the operators of aircraft, railroads, trucks,
4 and buses to perform in a safe and responsible manner;

5 (3) the greatest efforts must be expended to eliminate
6 the abuse of alcohol and use of illegal drugs,
7 whether on duty or off duty, by those individuals who
8 are involved in the operation of aircraft, railroads,
9 trucks, and buses;

10 (4) the use of alcohol and illegal drugs has been
11 demonstrated to affect significantly the performance of
12 individuals, and has been proven to have been a critical
13 factor in transportation accidents;

14 (5) the testing of uniformed personnel of the
15 Armed Forces has shown that the most effective deter-
16 rent to abuse of alcohol and use of illegal drugs is in-
17 creased testing, including random testing;

18 (6) adequate safeguards can be implemented to
19 ensure that testing for abuse of alcohol or use of illegal
20 drugs is performed in a manner which protects an indi-
21 vidual's right of privacy, ensures that no individual is
22 harassed by being treated differently from other indi-
23 viduals, and ensures that no individual's reputation or
24 career development is unduly threatened or harmed;
25 and

1 (7) rehabilitation is a critical component of any
2 testing program for abuse of alcohol or use of illegal
3 drugs, and should be made available to individuals, as
4 appropriate.

5 (b)(1) Title VI of the Federal Aviation Act of 1958 (49
6 App. U.S.C. 1421 et seq.) is amended by adding at the end
7 thereof the following:

8 "ALCOHOL AND CONTROLLED SUBSTANCES TESTING

9 "TESTING PROGRAM

10 "SEC. 613. (a)(1) The Administrator shall, in the inter-
11 est of aviation safety, prescribe regulations within twelve
12 months after the date of enactment of this section. Such reg-
13 ulations shall establish a program which requires air carriers
14 and foreign air carriers to conduct preemployment, periodic
15 recurring, random and post-accident testing of airmen, crew-
16 members, airport security screening contract personnel, and
17 other air carrier employees responsible for safety-sensitive
18 functions (as determined by the Administrator), and testing of
19 such individuals upon a reasonable suspicion that they have
20 used, without lawful authorization, alcohol or a controlled
21 substance.

22 "(2) The Administrator shall establish a program appli-
23 cable to employees of the Federal Aviation Administration
24 whose duties include responsibility for safety-sensitive func-
25 tions. Such program shall provide for preemployment, period-

1 ic recurring, random and post-accident testing, and testing of
2 such individuals upon a reasonable suspicion that they have
3 used, without lawful authorization, alcohol or a controlled
4 substance.

5 “(3) In prescribing regulations under the programs re-
6 quired by this subsection, the Administrator shall require, as
7 the Administrator considers appropriate, the suspension or
8 revocation of any certificate issued to such an individual, or
9 the disqualification or dismissal of any such individual, in ac-
10 cordance with the provisions of this section, in any instance
11 where a test conducted and confirmed under this section indi-
12 cates that such individual has used, without lawful authoriza-
13 tion, alcohol or a controlled substance.

14 “PROHIBITION ON SERVICE

15 “(b)(1) No person may use, without lawful authoriza-
16 tion, alcohol or a controlled substance after the date of enact-
17 ment of this section and serve as an airman, crewmember,
18 airport security screening contract personnel, air carrier em-
19 ployee responsible for safety-sensitive functions (as deter-
20 mined by the Administrator), or employee of the Federal
21 Aviation Administration with responsibility for safety-sensi-
22 tive functions.

23 “(2) No individual who is determined to have used,
24 without lawful authorization, alcohol or a controlled sub-
25 stance after the date of enactment of this section shall serve
26 as an airman, crewmember, airport security screening con-

1 tract personnel, air carrier employee responsible for safety-
2 sensitive functions (as determined by the Administrator), or
3 employee of the Federal Aviation Administration with re-
4 sponsibility for safety-sensitive functions unless such individ-
5 ual has completed a program of rehabilitation described in
6 subsection (c) of this section.

7 “(3) Any such individual determined by the Administra-
8 tor to have used, without lawful authorization, alcohol or a
9 controlled substance after the date of enactment of this sec-
10 tion who (A) refuses to undertake a rehabilitation program
11 described in subsection (c) of this section, (B) fails to com-
12 plete such a rehabilitation program, (C) has previously under-
13 taken or completed such a rehabilitation program, or (D) has
14 been determined by the Administrator to have served as an
15 airman, crewmember, airport security screening contract per-
16 sonnel, air carrier employee responsible for safety-sensitive
17 functions (as determined by the Administrator), or employee
18 of the Federal Aviation Administration with responsibility for
19 safety-sensitive functions while impaired by or under the in-
20 fluence of alcohol or a controlled substance, shall not be per-
21 mitted to perform the duties relating to air transportation
22 which such individual performed prior to the date of such
23 determination.

24 “PROGRAM FOR REHABILITATION

25 “(c)(1) Each air carrier and foreign air carrier shall es-
26 tablish and maintain a rehabilitation program which at a min-

1 imum provides for the identification and opportunity for treat-
2 ment of employees referred to in subsection (b) of this section
3 in need of assistance in resolving problems with the use,
4 without lawful authorization, of alcohol or controlled sub-
5 stances. Each air carrier and foreign air carrier is encouraged
6 to make such program available to all of its employees in
7 addition to those employees referred to in subsection (b) of
8 this section. Nothing in this subsection shall preclude any air
9 carrier or foreign air carrier from establishing a program
10 under this subsection in cooperation with any other air car-
11 rier or foreign air carrier.

12 “(2) The Administrator shall establish and maintain a
13 rehabilitation program which at a minimum provides for the
14 identification and opportunity for treatment of those employ-
15 ees of the Federal Aviation Administration whose duties in-
16 clude responsibility for safety-sensitive functions who are in
17 need of assistance in resolving problems with the use of alco-
18 hol or controlled substances.

19 “PROCEDURES

20 “(d) In establishing the program required under subsec-
21 tion (a) of this section, the Administrator shall develop re-
22 quirements which shall—

23 “(1) promote, to the maximum extent practicable,
24 individual privacy in the collection of specimen
25 samples;

1 “(2) with respect to laboratories and testing pro-
2 cedures, incorporate the Department of Health and
3 Human Services scientific and technical guidelines
4 dated April 11, 1988, and any subsequent amendments
5 thereto, including mandatory guidelines which—

6 “(A) establish comprehensive standards for
7 all aspects of laboratory drug testing and labora-
8 tory procedures to be applied in carrying out this
9 section, including standards which require the use
10 of the best available technology for ensuring the
11 full reliability and accuracy of drug tests and
12 strict procedures governing the chain of custody
13 of specimens collected for drug testing;

14 “(B) specify the drugs for which individuals
15 may be tested; and

16 “(C) establish appropriate standards and pro-
17 cedures for periodic review of laboratories and
18 criteria for certification and revocation of certifica-
19 tion of laboratories to perform drug testing in
20 carrying out this section;

21 “(3) provide that all tests which indicate the use,
22 without lawful authorization, of alcohol or a controlled
23 substance by any individual shall be confirmed by a sci-
24 entifically recognized method of testing capable of pro-

1 viding quantitative data regarding alcohol or a con-
2 trolled substance;

3 “(4) require that all laboratories involved in the
4 testing of any individual under this section shall have
5 the capability and facility, at such laboratory, of per-
6 forming screening and confirmation tests;

7 “(5) provide for the confidentiality of test results
8 and medical information (other than information relat-
9 ing to alcohol or a controlled substance) of employees,
10 except that the provisions of this paragraph shall not
11 preclude the use of test results for the orderly imposi-
12 tion of appropriate sanctions under this section; and

13 “(6) ensure that employees are selected for tests
14 by nondiscriminatory and impartial methods, so that no
15 employee is harassed by being treated differently from
16 other employees in similar circumstances.

17 “EFFECT ON OTHER LAWS AND REGULATIONS

18 “(e)(1) No State or local government shall adopt or put
19 into effect any law, rule, regulation, ordinance, standard, or
20 order that is inconsistent with the regulations promulgated
21 under this section, except that the regulations promulgated
22 under this section shall not be construed to preempt provi-
23 sions of State criminal law which impose sanctions for reck-
24 less conduct leading to actual loss of life, injury or damage to
25 property, whether the provisions apply specifically to employ-

1 ees of an air carrier or foreign air carrier, or to the general
2 public.

3 “(2) Nothing in this section shall preclude the Adminis-
4 trator from adopting or continuing in effect other regulations
5 intended to protect persons or property on the ground or in
6 the air from the hazards to safety associated with the poten-
7 tial use of alcohol or controlled substances by airmen, crew-
8 members, airport security screening contract personnel, air
9 carrier employees responsible for safety-sensitive functions
10 (as determined by the Administrator), or employees of the
11 Federal Aviation Administration with responsibility for
12 safety-sensitive functions.

13 “DEFINITION

14 “(f) For the purposes of this section, the term ‘controlled
15 substance’ means any substance under section 102(6) of the
16 Controlled Substances Act (21 U.S.C. 802(6)) whose use the
17 Administrator has determined poses a risk to transportation
18 safety.”.

19 (2) That portion of the table of contents of the Federal
20 Aviation Act of 1958 relating to title VI is amended by
21 adding at the end thereof the following:

“Sec. 613. Alcohol and controlled substances testing.

“(a) Testing program.

“(b) Prohibition on service.

“(c) Program for rehabilitation.

“(d) Procedures.

“(e) Effect on other laws and regulations.

“(f) Definition.”.

1 (c) Section 202 of the Federal Railroad Safety Act of
2 1970 (45 U.S.C. 431) is amended by adding at the end there-
3 of the following:

4 "(1)(1) The Secretary shall, within one year after the
5 date of enactment of this subsection, review existing rules,
6 regulations, standards, and orders governing alcohol and drug
7 use in railroad operations for the purpose of determining
8 whether they are adequate to ensure safety. In conducting
9 such review, the Secretary shall specifically—

10 "(A) require that all railroad employees responsi-
11 ble for safety-sensitive functions (as determined by the
12 Secretary) be subject to testing on a random basis for
13 the use, without lawful authorization, of alcohol or a
14 controlled substance;

15 "(B) consider application of existing rules, regula-
16 tions, orders, and standards to other categories of em-
17 ployees, including employees responsible for the safety
18 of passengers, railroad rolling stock, or track and re-
19 lated structures;

20 "(C) require, as the Secretary considers appropri-
21 ate, disqualification for an established period of time or
22 dismissal of any employee determined to have used or
23 to have been impaired by alcohol while on duty; and

24 "(D) require, as the Secretary considers appropri-
25 ate, disqualification for an established period of time or

1 dismissal of any employee determined to have used a
2 controlled substance, whether on duty or not on duty,
3 except as permitted for medical purposes by law and
4 any rules, regulations, standards or orders issued under
5 this Act.

6 Nothing in this subsection shall be construed to restrict the
7 discretion of the Secretary to continue in force, amend, or
8 further supplement any rules, regulations, standards, and
9 orders governing alcohol and drug use in railroad operations
10 issued before the date of enactment of this subsection.

11 “(2) In carrying out the provisions of this subsection,
12 the Secretary shall develop requirements which shall—

13 “(A) promote, to the maximum extent practicable,
14 individual privacy in the collection of specimen
15 samples;

16 “(B) with respect to laboratories and testing pro-
17 cedures, incorporate the Department of Health and
18 Human Services scientific and technical guidelines
19 dated April 11, 1988, and any subsequent amendments
20 thereto, including mandatory guidelines which—

21 “(i) establish comprehensive standards for all
22 aspects of laboratory drug testing and laboratory
23 procedures to be applied in carrying out this Act,
24 including standards which require the use of the
25 best available technology for ensuring the full reli-

1 ability and accuracy of drug tests and strict proce-
2 dures governing the chain of custody of specimens
3 collected for drug testing;

4 "(ii) specify the drugs for which individuals
5 may be tested; and

6 "(iii) establish appropriate standards and pro-
7 cedures for periodic review of laboratories and
8 criteria for certification and revocation of
9 certification of laboratories to perform drug testing
10 in carrying out this Act;

11 "(C) provide that all tests which indicate the use,
12 without lawful authorization, of alcohol or a controlled
13 substance by any employee shall be confirmed by a sci-
14 entifically recognized method of testing capable of pro-
15 viding quantitative data regarding alcohol or a con-
16 trolled substance;

17 "(D) require that all laboratories involved in the
18 testing of any employee under this section shall have
19 the capability and facility, at such laboratory, of per-
20 forming screening and confirmation tests;

21 "(E) provide for the confidentiality of tests results
22 and medical information (other than information relat-
23 ing to alcohol or a controlled substance) of employees,
24 except that the provisions of this subparagraph shall

1 not preclude the use of test results for the orderly im-
2 position of appropriate sanctions under this section; and

3 "(F) ensure that employees are selected for tests
4 by nondiscriminatory and impartial methods, so that no
5 employee is harassed by being treated differently from
6 other employees in similar circumstances.

7 "(3) For the purposes of this subsection, the term 'con-
8 trolled substance' means any substance under section 102(6)
9 of the Controlled Substances Act (21 U.S.C. 802(6)) whose
10 use the Secretary has determined poses a risk to transporta-
11 tion safety."

12 (d)(1) The Commercial Motor Vehicle Safety Act of
13 1986 (Public Law 99-570; 100 Stat. 5223) is amended by
14 adding at the end the following:

15 "SEC. 12020. ALCOHOL AND CONTROLLED SUBSTANCES
16 TESTING.

17 "(a) REGULATIONS.—The Secretary shall, in the inter-
18 est of commercial motor vehicle safety, prescribe regulations
19 within twelve months after the date of enactment of this sec-
20 tion. Such regulations shall establish a program which re-
21 quires motor carriers to conduct preemployment, periodic
22 recurring, random and post-accident testing of the opera-
23 tors of commercial motor vehicles, and testing upon a reason-
24 able suspicion that they have used, without lawful authoriza-
25 tion, alcohol or a controlled substance.

1 “(b) TESTING.—(1) In promulgating such regulations,
2 the Secretary shall require that post-accident testing of the
3 operator of a commercial motor vehicle be conducted in the
4 case of any accident involving a commercial motor vehicle in
5 which occurs loss of human life, or, as determined by the
6 Secretary, other serious accidents involving bodily injury or
7 significant property damage.

8 “(2) Nothing in subsection (a) of this section shall pre-
9 clude the Secretary from providing in such regulations that
10 such testing be conducted as part of the medical examination
11 required by subpart E of part 391 of title 49, Code of Federal
12 Regulations, with respect to those operators of commercial
13 motor vehicles to whom such part is applicable.

14 “(c) PROGRAM FOR REHABILITATION.—The Secretary
15 shall promulgate regulations setting forth requirements for a
16 rehabilitation program for the identification and opportunity
17 for treatment of operators of commercial motor vehicles who
18 are determined to have used, without lawful authorization,
19 alcohol or a controlled substance. The Secretary shall deter-
20 mine the circumstances under which such operators shall be
21 required to participate in such program. Nothing in this sub-
22 section shall preclude a motor carrier from establishing a pro-
23 gram under this subsection in cooperation with any other
24 motor carrier.

1 “(d) PROCEDURES FOR TESTING.—In establishing the
2 program required under subsection (a) of this section, the
3 Secretary shall develop requirements which shall—

4 “(1) promote, to the maximum extent practicable,
5 individual privacy in the collection of specimen
6 samples;

7 “(2) with respect to laboratories and testing pro-
8 cedures, incorporate the Department of Health and
9 Human Services scientific and technical guidelines
10 dated April 11, 1988, and any subsequent amendments
11 thereto, including mandatory guidelines which—

12 “(A) establish comprehensive standards for
13 all aspects of laboratory drug testing and labora-
14 tory procedures to be applied in carrying out this
15 section, including standards which require the use
16 of the best available technology for ensuring the
17 full reliability and accuracy of drug tests and
18 strict procedures governing the chain of custody
19 of specimens collected for drug testing;

20 “(B) specify the drugs for which individuals
21 may be tested; and

22 “(C) establish appropriate standards and pro-
23 cedures for periodic review of laboratories and
24 criteria for certification and revocation of

1 certification of laboratories to perform drug testing
2 in carrying out this section;

3 "(3) provide that all tests which indicate the use,
4 without lawful authorization, of alcohol or a controlled
5 substance by any individual shall be confirmed by a sci-
6 entifically recognized method of testing capable of pro-
7 viding quantitative data regarding alcohol or a con-
8 trolled substance;

9 "(4) require that all laboratories involved in the
10 testing of any individual under this section shall have
11 the capability and facility, at such laboratory, of per-
12 forming screening and confirmation tests;

13 "(5) provide for the confidentiality of test results
14 and medical information (other than information relat-
15 ing to alcohol or a controlled substance) of employees,
16 except that the provisions of this paragraph shall not
17 preclude the use of test results for the orderly imposi-
18 tion of appropriate sanctions under this section; and

19 "(6) ensure that employees are selected for tests
20 by nondiscriminatory and impartial methods, so that no
21 employee is harassed by being treated differently from
22 other employees in similar circumstances.

23 "(e) EFFECT ON OTHER LAWS AND REGULATIONS.—
24 No State or local government shall adopt or put into effect
25 any law, rule, regulation, ordinance, standard, or order that

1 is inconsistent with the regulations promulgated under this
2 section, except that the regulations promulgated under this
3 section shall not be construed to preempt provisions of State
4 criminal law which impose sanctions for reckless conduct
5 leading to actual loss of life, injury, or damage to property,
6 whether the provisions apply specifically to commercial
7 motor vehicle employees, or to the general public.

8 “(f) APPLICATION OF PENALTIES.—(1) Nothing in this
9 section shall be construed to supersede any penalty applicable
10 to the operator of a commercial motor vehicle under this Act
11 or any other provision of law.

12 “(2) The Secretary shall determine appropriate sanc-
13 tions for commercial motor vehicle operators who are deter-
14 mined, as a result of tests conducted and confirmed under this
15 section, to have used, without lawful authorization, alcohol or
16 a controlled substance but are not under the influence of alco-
17 hol or a controlled substance, as provided in this title.

18 “(g) DEFINITION.—For the purposes of this section, the
19 term ‘controlled substance’ means any substance under sec-
20 tion 102(6) of the Controlled Substances Act (21 U.S.C.
21 802(6)) whose use the Secretary has determined poses a risk
22 to transportation safety.”.

23 “(2) The table of contents of the Commercial Motor Vehi-
24 cle Safety Act of 1986 (Public Law 99-570; 100 Stat. 5223)
25 is amended by adding at the end thereof the following:

“Sec. 12020. Alcohol and controlled substances testing.”.

1 (3)(A) The Secretary shall design, within nine months
2 after the date of enactment of this section and implement,
3 within fifteen months after the date of enactment of this sec-
4 tion, a pilot test program for the purpose of testing the
5 operators of commercial motor vehicles on a random basis to
6 determine whether an operator has used, without lawful
7 authorization, alcohol or a controlled substance.

8 (B) The Secretary shall solicit the participation of States
9 which are interested in participating in such program and
10 shall select four States to participate in the program.

11 (C) The Secretary shall ensure that the selection made
12 pursuant to this paragraph is representative of varying geo-
13 graphical and population characteristics of the Nation, and
14 takes into consideration the historical geographical incidence
15 of commercial motor vehicle accidents involving loss of
16 human life.

17 (D) The pilot program authorized by this paragraph
18 shall continue for a period of one year. The Secretary shall
19 consider alternative methodologies for implementing a system
20 of random testing of operators of commercial motor vehicles.

21 (E) Not later than thirty months after the date of enact-
22 ment of this section, the Secretary shall prepare and submit
23 to the Congress a comprehensive report setting forth the re-
24 sults of the pilot program conducted under this paragraph.
25 Such report shall include any recommendations of the Secre-

1 tary concerning the desirability and implementation of a
 2 system for the random testing of operators of commercial
 3 motor vehicles.

4 (F) For purposes of carrying out this paragraph, there
 5 shall be available to the Secretary \$5,000,000 from funds
 6 made available to carry out section 404 of the Surface Trans-
 7 portation Assistance Act of 1982 for fiscal year 1989.

8 (G) For purposes of this paragraph, the term "commer-
 9 cial motor vehicle" shall have the meaning given to such
 10 term in section 12019(6) of the Commercial Motor Vehicle
 11 Safety Act of 1986 (Public Law 99-570; 100 Stat. 5241).

○

The CHAIRMAN. Thank you.

The committee is pleased to have our distinguished Secretary of Transportation.

Secretary Skinner, we welcome you and would be delighted to hear from you at this time.

We have your complete statement. It will all be included in the record in its entirety, and you can highlight it or give it as you wish.

STATEMENT OF HON. SAMUEL K. SKINNER, SECRETARY, DEPARTMENT OF TRANSPORTATION, ACCOMPANIED BY GRADY COTHEN

Secretary SKINNER. Thank you, Chairman Hollings, Senator Danforth. I am pleased to appear before the committee once again and discuss a matter of great significance. I share, Senator Danforth and Senator Hollings, your concerns regarding this, and I am delighted to report that the Department of Transportation is, in fact, moving forward in both areas at what I would consider all deliberate speed.

When I appeared before the committee during confirmation, I indicated my personal opinion that the problem of drug abuse and the problem of alcohol abuse, especially as it relates to safety-related jobs, would be a top priority problem that I would address.

Nothing that I have seen since my confirmation leads me to any other conclusion and, in fact, if anything, my commitment today is even stronger.

The Department of Transportation in the drug area has the most comprehensive testing rules for safety-related jobs of any department of government. Those rules were issued shortly before I became Secretary.

Unfortunately, there was not enough time to sufficiently plan the implementation of those rules as quickly as we all might like before their promulgation.

But, under the direction of the Deputy Secretary of Transportation, shortly after my confirmation, I set up a special task force to make sure that all aspects of our drug rules, including those aspects of random testing were, in fact, put into effect as soon as practicable and that the industry was advised, even while the test cases were pending, that we would, when the courts allow us, begin that implementation.

That process is beginning. Some small changes will be made in the implementation phase, but right now the limiting factor is the Supreme Court or the courts of this country, who had imposed a stay in one of the many cases that I am named as a defendant in that, and we are moving forward with all vigor.

It is my intention this fall to personally argue one of those cases, a significant case, before one of the appellate courts of this jurisdiction to ensure that everyone understands the total commitment that this department is making to this very important problem.

So, I can report to you that as it relates to drugs, I think our efforts both before and after my confirmation are moving forward at all deliberate speed. And the rules that we will eventually be allowed to enforce at the Department of Transportation will not only be the most comprehensive, but the enforcement will, in fact, be effective because if we have rules that are not enforced, they are ineffective.

This week with the acquiescence of the Office of Management and Budget, we have announced our plan to put out an advance notice of proposed rule making as it relates to alcohol.

This is also a very, very key problem. It is a different problem, however, than the problem of drugs. And while some of the procedures and administrative steps as far as enforcement of any new rule as it relates to alcohol will be similar, there are a lot of differences as relate to testing procedures, detection and, in some cases, rehabilitation and returning people to the work force.

I, like Senator Danforth, do not believe that we should start again from scratch on the rules as would be required by the bill that has passed the House. It is at least an 18 to 24-month process to get these cases through the courts, through a district court, a court of appeals, and in some cases the Supreme Court.

And if the rules that we have passed are comprehensive, we should not go back and "reinvent the wheel", and that applies to the rules that we have regarding alcohol as well as the rules we have relating to drugs.

I think to some degree the congressional interest has been increased because of the lack of action at the Department of Transportation in the past.

I hope you will give the department credit for the steps they have taken, not only before but since my confirmation and, in fact, I hope you will place credibility on my commitment to do everything I can to put into place effective, meaningful programs to deal with both of these problems.

I would ask that my complete remarks be made part of the record.

The CHAIRMAN. They will be included.

Secretary SKINNER. I would also indicate that on a matter that is of interest to this committee, we have just transmitted the Coast Guard's proposal to gain direct access to the National Driver Register, as it relates to maritime employees and, of course, the Hazelwood situation. Captain Hazelwood's situation in Alaska is just one more demonstration of the need to have an effective program in all aspects.

I also want to assure you that the Federal Railroad Administration is laboring to produce the volume of regulations that will implement the "Rail Safety Improvement Act of 1988." And, of course, I have indicated that in my remarks that the FAA has just released its proposed rule to use the National Driver Register to verify drunk driving records of airmen and deny licenses of renewals where appropriate.

Therefore, I think the record so far is that we are moving forward, and it continues to be, whether it be rail, aviation or motor carrier, that we are moving forward at all deliberate speed. And, so far, because of the way we have drafted the rules and the thought that we have given to the implementation, we have been successful in the courts in all of the significant cases that have gone to the Supreme Court.

And while we have some cases that have been stayed and we have some problems at the appellate court level, I am optimistic as a result of the Supreme Court case, the *Skinner* case as well as other cases, that we will be successful in convincing the court that we have drawn the proper balance between the rights of the individuals and the rights of the American people to have people in safety-related jobs in transportation be drug and alcohol-free.

With that in mind, I would entertain any questions from the committee.

[The statement and questions and answers follow:]

STATEMENT OF HON. SAMUEL K. SKINNER, SECRETARY, DOT

Mr. Chairman and members of the committee:

I am pleased to be before the committee once again, to address an issue of the utmost significance to all Americans—the assurance that our transportation system, be it aircraft, trains, motor vehicles, or waterborne vessels, is in the hands of operators who can do their best and who are neither under the influence of alcohol nor users of illegal drugs.

When I appeared here for confirmation hearings, I stressed the insidious effects of alcohol and controlled substances on American transportation, and I stated that combatting this would be among my highest priorities. My first months in office have convinced me that we have not overestimated the problem, and it must be addressed ever more firmly. If, and I stress "if" because we do not yet have the facts, the *Exxon Valdez* grounding was caused by misuse of alcohol, this will be only the most recent, most graphic example of our challenge.

This committee and its leaders have been in the forefront of the drive to force change where change must come, and to encourage the many voluntary efforts between employee and employer, such as operation Red Block, that are at the core of true change. I am mindful, as is the committee, that very legitimate and significant issues of employee privacy and confidentiality are central to taking steps in this area. I am the "employer" of almost 99,000 agency employees at DOT, and I am ever aware of the employee's interest.

It was this committee that originated tougher new penalties for drunk driving convictions in the motor carrier industry, that applied enforcement directly against individuals violating the Federal Railroad Safety Act, and that acted swiftly to open

the National Driver Register for employer and agency checks of the driving records of those who would operate aircraft and locomotives. You deserve congratulations.

We all recognize that more can be and must be done. The Coast Guard, for example, has already drafted statutory changes to tighten the merchant seaman licensing process, and I have submitted them for review within the administration. Last Wednesday I transmitted the Coast Guard's proposal to gain direct access to the National Driver Register.

The Federal Railroad Administration is laboring to produce the volume of regulations that will implement the "Rail Safety Improvement Act of 1988". This landmark safety legislation was a direct product of the bipartisan efforts of Senator Exon's subcommittee in the last Congress. The FAA has just released its proposed rule to use the National Driver Register to verify drunk driving records of airmen and deny licenses or renewals where appropriate.

The question before this committee today is whether specific statutory mandates are now needed, number one, to support the random drug testing measures already in place in the railroad, aviation, motor carrier, and other modes and, number two, to extend testing measures to cover alcohol. I appreciate being asked to provide my views, because I am the one ultimately responsible for issuing defensible rules.

Your letter of invitation specifically asked me to address the need for legislation such as S. 561, which would mandate both alcohol and drug testing in three major modes, and whether other modes should be covered. Having reviewed the current authorities under which our rules were issued, I think our statutory authority for the rail, aviation, and motor carrier rules is broad and strong—I think we'll win our cases on the random drug testing rules just as we won on the FRA post-accident rule. The facts justify our rules, and the courts will see that.

On this subject, you may know that I reluctantly advised Chairman Dingell that I could not recommend to the President that he sign the House bill in its current form, because it would require us to start all over again on our drug and alcohol rules after being upheld in the Supreme Court. We, as a Nation, can't afford that.

Your letter also sought my views on the issue of extending our test measures to alcohol. The requirement contained in S. 561 to issue rules within one year that mandate random alcohol testing could present a problem. The herculean effort by the six DOT agencies in 1987-88 to issue the new drug rules did not include alcohol. Now we need to review the adequacy of our alcohol rules. Whatever the findings in the *Valdez* case, that situation makes crystal clear that we may need to upgrade the licensing and other controls we have on alcohol misuse.

I have decided that we must step forward and address the issue of alcohol misuse in transportation now. I am cognizant of the complexity of the subject matter, of the complicated human motivations that enter into this problem, and of the overarching need to proceed with full justification and care, not with righteousness or vindictiveness. But we need to start, and I have just directed my lawyers to prepare an advance notice of proposed rulemaking that will let us explore what more needs to be done and how best to do it.

This is not a step lightly taken. DOT has had alcohol misuse rules on the books that seem to have worked fairly well for years. The Coast Guard's mandatory post-accident alcohol testing begins in December. I am confident that the great majority of transportation workers do not and would never impair their abilities to carry out their duties by misuse of alcohol. But it is my considered judgment that the alcohol problem needs to be revisited in an exploratory rulemaking.

I have ordered an "ANPRM" before issuing specific proposals because I believe we need to gather more facts and viewpoints before we lock ourselves into a specific approach. The complexities of a testing program for alcohol are very different from those of a drug testing program. Alcohol is not, after all, an illegal substance. And the methodologies for alcohol testing differ from those of drug testing. A lot more thought needs to go into the idea of extending random testing to alcohol, and I am making it a high priority to get needed information. Alcohol has a relatively short period of manifestation in the body, for example, making random tests less likely to uncover a condition constituting legal impairment. The methodologies to counter substance abuse also have varying effectiveness, and our ANPRM will emphasize the apparent greater value of educational and training techniques in combatting alcohol abuse, as well as the importance of follow-up treatment and monitoring of performance for individuals returned to duty following rehabilitation.

A lot of people would like to act more swiftly. The House bill, for example, would mandate random alcohol test rules just 90 days after enactment of the bill. I look at the long term, and I know that to develop any program that will achieve its objectives and withstand legal challenge requires more care and consideration.

With this in mind, Mr. Chairman, I would say that the timeframe for issuing final alcohol testing rules appears too restrictive to permit us to develop the kind of administrative record that is necessary. Specifying the five circumstances for alcohol testing may also leave insufficient flexibility to develop a fully justified rule. In my mind, it is most important to commit the time and effort needed to do the job right, and I seek the committee's support for flexibility rather than an unyielding statutory mandate.

I am advised also that there may be other aspects of the bill that need attention. For example, language was added last year to a similar bill that would have permitted us to honor our international obligations when it comes to the mandatory random testing. The basic problem is that some other countries do not permit their employers to undertake the kind of testing we call for, and that we need the flexibility to adopt rule changes that solve this problem.

In my view, Mr. Chairman, my working relationship with the committee has been excellent, and I hope you will provide me the needed flexibility to do a good, thorough job on our ANPRM. In this vein, let me take the time to thank you all for the rapid and favorable action you have taken on all the President's nominations to the Department of Transportation. Having the Deputy Secretary, a general counsel, and two Assistant Secretaries aboard already, and anticipating having an FAA Administrator and two more Assistant Secretaries soon, makes my job a lot simpler and makes the whole Department a lot more responsive to Congress.

Mr. Chairman, this completes my prepared statement, and I would be pleased to take any questions you or other members of the committee may have.

QUESTIONS OF THE CHAIRMAN AND THE ANSWERS THERETO

Question. Do you believe that the enactment of testing legislation, such as S. 561, would improve your position as the Department of Transportation's (DOT) testing rules are challenged in court?

Answer. Enactment of such legislation would probably require conforming changes in DOT rules. At the present time, substantive changes, even those required by statute, would complicate our litigation position. Most drug testing of 4 million private and public sector transportation industry employees under DOT rules is scheduled to begin in December 1989, and all DOT drug testing rules have been challenged in various courts. Legislation requiring substantive changes to the existing rules, especially as the scheduled implementation dates for industry testing approach, is likely to require, at minimum, supplemental briefs, which could delay issuance of decisions. It might also generate new lawsuits; and old and new litigants would probably seek stays of the scheduled implementation dates.

Question. During the Committee's hearing, there was discussion regarding the use of a second test to ensure accuracy when a drug test is given. Under S. 561 and DOT's testing rules, drug screening is a two-step process: an initial screening and a confirmatory test where the initial screening suggests a positive finding. However, a labor witness further testified at the hearing that a "split sample" is necessary to guarantee accuracy. Under this process, after a urine sample is initially received, it would be split into two containers and sealed, with one sample being retained to verify any initial sample that produces a positive result, in cases where the first sample tested is called into question. It is argued that this would provide a necessary backup in the event of a problem with the first sample. Please clarify the Department of Transportation's position on "split samples".

Answer. The Department has evaluated the proposal that the original sample would "split" at point of collection, with one portion going to the laboratory for analysis and the other to a second storage site to be available for analysis at the request of the employee, in the event a confirmed positive result is reported on the first. It is not at all clear that this procedure would work to the employee's advantage. First, the remaining portion of sample from the original sample container is already available for reanalysis. The laboratory certification program includes safeguards to ensure that the original sample is retained for one year (for a positive) and is not contaminated. Second, adding "split sample" requirements will increase significantly the burden on the collector. The collection process is the most critical stage with respect to specimen identification, integrity and chain-of-custody documentation. Splitting each sample essentially doubles the burden of these important requirements. Placing this additional burden on the collector could increase the risk of a labeling, storage, documentation, or similar error that could work to the employee's disadvantage.

The "split sample" procedure also creates technical problems, including, in some cases, adequacy of sample volume. The procedure also involves considerable addi-

tional expense, although the Department would not object to additional expense if there were a concrete advantage with respect to the rights of employees.

Question. The DOT rules limit Federally-mandated testing to five drugs (marijuana, cocaine, opiates, amphetamines, and phencyclidine). What is the rationale for this and might an employer proceed with additional testing on their own? Would a second sample be required?

Answer. These drugs were identified by the Department of Health and Human Services (HHS) as five primary illegal drugs of abuse. Established HHS testing protocols exist for them, and HHS laboratories are specifically certified to test for them. Such testing safeguards do not presently exist for other drugs. Moreover, testing for legal drugs which may be abused (e.g., barbiturates) presents somewhat different problems and can complicate the process for deciding when a test should be considered positive. At present, DOT rules require employers to take a second, separate sample, not under the authority of the DOT program, if they want to test for additional drugs. The Department is considering, at this time, whether there are steps it can take to accommodate some employers' desire to test for additional drugs in the same sample. However, any change at this time, when all of the industry rules are under review by various courts, will likely complicate our litigation position and could delay issuance of decisions.

Question. DOT's testing regulations will eventually require random testing of 50 percent of the transportation work force each year. While S. 561 leaves this to the Department's discretion, some in industry have questioned whether a 50 percent rate is too high. What are your views on this?

Answer. Through the rulemaking process, the Department solicited comments on what the random testing rate should be. We proposed using a rate of up to 125 percent. The Department ultimately decided to use a 50 percent sample to maximize the deterrent value of random testing and minimize the economic and administrative burden on employers and employees. We also use this same rate in our internal program.

Question. Representatives of maritime labor testified that the Coast Guard's drug testing regulations place U.S.-flag vessels at a competitive disadvantage since our vessels will be required to bear the cost of testing while foreign-flag vessels will not be required to conduct any testing. What is your response?

Answer. There is no question that drug testing imposes an additional cost on U.S.-flag vessels, but I do not believe that the cost is so great as to put U.S. vessels at a competitive disadvantage. In any event, cost cannot be the only consideration. Virtually every safety initiative we undertake imposes some cost, and the key question is whether the cost is worthwhile. I do not consider the cost here to be excessive in relation to the potential safety value.

Question. Questions have been raised regarding the number of certified laboratories needed to perform testing in a timely and reliable manner. In that regard, are there a sufficient number of laboratories to meet anticipated testing volumes under S. 561 and the Department of Transportation's testing rules? If the number of certified laboratories is not increased, do you foresee any problems resulting from a backlog of samples and delays in the release of information? What consideration, if any, has been given to private-sector proposals to expand the number and distribution of certified labs through the use of private, non-profit accreditation programs?

Answer. I became concerned about this issue shortly after my arrival and asked the staff to verify whether or not enough toxicological laboratories will be certified by the Department of Health and Human Services (HHS) to handle the analysis of test samples that result from our new drug rules being implemented in December.

HHS has certified 31 labs so far, and estimates the annual capacity of these labs to be 20 million tests per year. HHS expects to be certifying a number of additional labs by the end of this year.

The phased implementation of DOT's industry rules means that the full 2-3 million estimated tests will not occur until 1991. Testing next year will be at the 25% (rather than 50%) rate, and most small firms will not start until the following year. Even with all existing federal employee testing, the currently certified labs have more than enough capacity.

The question of private-sector proposals to expand the number and distribution of certified labs through the use of private, non-profit accreditation programs is better directed to HHS. I understand there are difficult questions of quality control oversight, especially on-site inspections, that are at the core of assuring reliable tests. HHS' National Institute of Drug Abuse has been scrutinized by the Congress, and most involved parties accept their efforts as "state of the art". Given the sufficiency of test capacity, it is not clear why another accreditation agency would be worthwhile.

The CHAIRMAN. Well, Mr. Secretary, I think here I want to put in the record and emphasize that in reference to railroad testing, that last year there were 29 railroad accidents in which either drugs or alcohol were involved.

That followed, of course, the previous year's Amtrak tragedy here in which 16 people were killed. In the trucking industry the Insurance Institute for Highway Safety found that during 1986 in a random drug test of 300 truck drivers 30 percent tested positive. There was similar situation here with the bus and aviation industries.

As you well know, in the 1988 crash at Durango, the pilot was on cocaine, and your own Inspector General reported that 10,300 certified airmen had their driver's licenses suspended for driving their autos while intoxicated.

So, that goes to the Alaska case with the Exxon tanker where that particular pilot had suffered a withdrawal of his driver's license.

On the matter of random testing, tell me about a second test. There will be witnesses this morning who say fine, we want a random test, but then we want to conduct a second testing, because they have some statistical information of whose accuracy I'm not sure—that—let us say there is a 4 percent error. They do not want to be taking away a person's livelihood, let us say, as a result of being caught in that 4 percent margin of error.

From your experience and study and handling of the case, Mr. Secretary, do you think not only one test, but two tests ought to be given? I am thinking of the reality and the expense of conducting two tests.

Secretary SKINNER. No, I do not. We do, as you know, require both a screening test and a confirmation test on separate portions of the sample drawn from the original sample container, before a result can be reported as positive, and the department has been testing for some time. And we frankly have not had any significant problems as far as the false positive reading that everybody is concerned about.

And, in fact, if there is a question, there is remaining sample and a second testing procedure that can be used to verify the result. And as a result of that, based upon our experience, we have had no problems.

In fact, other than what I have heard from others—and we have a very comprehensive program in place already—that is not a problem. And a whole second testing procedure would undercut to some degree the random aspect of testing because after being detected, people know a second test is coming, and they might remain drug-free for a short period of time and then go right back on drugs.

The real advantage of a random test is they do not know when it is coming. They cannot prepare for it, and when it arrives if they are, in fact, regular drug users or even incidental drug users, it is going to show up. Then they can go through the necessary rehab and assessment program to determine the severity. And so we do not believe it is necessary.

We believe that is a red herring that is thrown out by those that do not understand the magnitude of the problem and do not under-

stand the need to have an effective program to ensure that we have a drug-free transportation industry.

[The following information was subsequently received for the record:]

There have also been suggestions that the original sample should be "split" at point of collection, with one portion going to the laboratory for analysis and the other to a second storage site to be available for analysis at the request of the employee, in the event a confirmed positive result is reported on the first. It is not at all clear that this procedure would work to the employee's advantage. First, the remaining portion of sample from the original sample container is already available for reanalysis. The laboratory certification program includes safeguards to ensure that the original sample is retained for one year (for a positive) and is not contaminated. Second, adding "split sample" requirements will increase significantly the burden on the collector. The collection process is the most critical stage with respect to specimen identification, integrity and chain-of-custody documentation. Placing this additional burden on the collector could result in an error that could work to the employee's advantage.

The "split sample" procedure creates technical problems, including, in some cases, adequacy of sample volume. The procedure also involves considerable additional expenses, although we would not object to the additional expense if we could see a concrete advantage with respect to the rights of employees.

The CHAIRMAN. Well, that goes to the heart of the mandatory rehabilitation, does it not? That is the big hangup.

I was in on those conferences with the House and the Senate. We made some progress with rail transportation. But those handling airline and truck transportation on the House side will sit there until two in the morning wanting mandatory rehabilitation which, again, as you just testified, and it seems to me, forestalls the value of random testing. If they know they are going to be rehabilitated and cannot lose anything, why worry. Have another drink.

Secretary SKINNER. Well, that is especially true as it relates to alcohol, Senator Hollings, because we do not have at this point a proven random testing program. I asked yesterday, when I met with alcoholism experts from outside the Department of Transportation—how much money are we spending and what are we doing to develop a positive test to determine whether someone is an alcoholic.

I mean, the ideal test would be able to detect on a random basis, whether it be blood, Breathalyzer or some kind of test, that would determine with an absolute certainty that, based upon the condition of this individual and the showing of a certain manifestation in the blood and the body of certain indications that this person is, in fact, an alcoholic. There is no such test.

Now, the drug test detects the presence of drugs. The alcohol test, the random test that we are trying to develop is a much harder thing to do because alcohol stays with the person for four or five hours and then it goes below the testing level while drugs stay for a period of days.

Therefore, we are dependent upon supervisors, peers, and those with a problem to come forward in order to help a person. And if, in fact, that person knows that even if they get caught in some kind of testing procedure, they will get their job back automatically without regard to what happens, there is no deterrent in the random testing aspect of the program.

I might add also that mandatory rehabilitation loses the flexibility of the employer. It is one thing to encourage education and en-

courage programs. It is another thing to mandate a permanent job ad infinitum for someone who has a problem without giving the employer the flexibility to deal with it.

The CHAIRMAN. With respect to the two samples taken, tell us about the mechanics of the use of the second sample. When do you use it, when the person demands it or questions the first test or what?

Secretary SKINNER. The original sample is retained in a separate area of the lab away from the tests are actually run and it is available upon request of the individual if it tests positive. In fact, if it tests positive, then the second test is run to make sure that the positive is a positive. And so, therefore, it is not necessary to make a request, because the second portion of the sample is run through in a different testing procedure if the first tests positive. But subsequent retesting can also be done at the request of the employee.

The CHAIRMAN. What do you consider random? What percent, 50 percent, 10 percent?

Secretary SKINNER. Right now the Department of Transportation has a 50 percent random sample. That means the number of tests annually must equal 50 percent of the work force.

Now, the picking of the random sample is also important, and some of the approaches allow too much mandating of where the samples will be taken. The samples have to be taken across the board and the random testing selection process must go across the board. So that we have a random sample taken in all jobs.

We do not want statistics to drive a situation where some key sectors of employment are not covered nearly enough because others are covered too much, which can happen over a short period of time if you do not leave flexibility in the random selection process.

The CHAIRMAN. Senator Danforth.

Senator DANFORTH. Mr. Secretary, we have had hearings over a period of years on the question of drug testing. We have had a variety of experts appear before us. We have had factual evidence presented as well as the opinions of the experts on the problem of alcohol and drug use in the transportation industries.

Senator Hollings has mentioned some of the specific cases in his comments. In addition to what he has mentioned, it is my understanding that since the Department of Transportation started its own employee testing program in September 1987, 106 FAA employees have tested positive for drug use. Seventy-four of them were air traffic controllers.

In addition to that in shipping we have the disaster of the *Exxon Valdez* and, as I understand it, the captain of that ship was tested positive for alcohol use.

Now, you say you are going to argue one of these cases and what courts do is to weigh the program against the need. Is there any doubt in your mind as you go to court that we have made a powerful record that there is, in fact, a serious threat to life and limb and property from the use of alcohol and drugs by people who are in the transportation industry?

Secretary SKINNER. No. In fact, it is interesting, I think, in some of the disciplines where we have not done testing, if we were allowed even on a test basis to do random sampling of employees,

say, in mass transportation, the statistics could, based on estimates I have received from others who are involved in the industry, be extremely alarming.

So, I think if anything, the record is strong, but the moment we are allowed by the courts to do random testing on a regular basis in some industries, we are going to see percentages based upon what I hear that are much higher than what you found.

Air traffic controllers, for instance, the percentage on the total number of tests is relatively small compared to what you are going to see in other industries. The military is our best example. We had 10 percent at the beginning five years ago in the Coast Guard program. We are down to less than 3 on a random testing basis. That is effective in some cases.

I was talking to someone the other day, Senator Danforth, who did a blind test where they tracked—they took the test sample but were not allowed to use it for sanction purposes. So, therefore, they took it, and on a random basis, and then validated the performance of the employee after a period of time, in the cases where that person who had tested positive for drugs but had been retained or employed anyway because of the inability to use it because of some legal restrictions. They were able to keep the results for study purposes, and they found a direct correlation between the entry level performers' drug positive findings and their lack of performance.

Now, of course, that same person got criticized for putting that person on the payroll to begin with by exposing the test results to show there is a correlation. But I think as soon as we get random testing underway, we are going to see some very, very significant findings.

It has happened in most areas where it has been started. As I mentioned, the percentages in the air traffic controller work force is relatively small compared to what it is going to be in other disciplines once we are allowed to put those tests in place. I have heard estimates from people in the industry of 20 percent in the mass transit industry in major cities.

I have heard people say, in preemployment screening which is a good test to some degree, that they pick up as much as 30-40 percent are screened out and not hired because they test positive.

Senator DANFORTH. When we had the hearing on the Chase, Maryland tragedy, the engineer and brakeman both testified separately.

They both had started working for the railroad 14 years earlier and they each separately said that when they started out, there was about 90 percent drug and alcohol use on the job, but that it had gone down in subsequent years. We asked to what level. One of them said 40 to 50 percent, the other said 10 to 20 percent.

So taking the lowest figure, 10 to 20 percent drug use by engineers, firemen and brakemen of drug and alcohol is a very, very dangerous situation.

Secretary SKINNER. There is no question in my mind, the best way to find out what is going on is to get outside the beltway and talk to people who are running the businesses, who employ the people, who do the tests, who know.

As you know, I have done a lot of that in the first four months and there is nothing that I have heard from anybody that leads me

to believe anything other than in those industries we have not tested, that we have a significant problem in a number of them that needs to be addressed immediately.

Senator DANFORTH. In my remaining minute, I would like to ask you just one other question. We have been working very hard in this Committee and in the Senate to pass testing legislation and we have succeeded, but we then ran into the House and the House stonewalled us for a very long period of time.

Now the House has come forward with its own idea and my own view is that its own idea is maybe a step or two steps backward, rather than a step forward. We are willing to bargain with them about details in the legislation, but my understanding is, what they have done is to provide for mandatory reinstatement, a right of reinstatement. The way that would work is that—let us suppose a locomotive engineer finished his shift, was tested and was found to be knee-walking drunk. Under the House bill, that engineer would have a right to retain his job. There is no such right now, is there, to retain your job if you are drunk, or if you are on drugs? We would be creating a new statutory right to keep your job if you were shown, proven, to have used drugs or alcohol on the job.

Secretary SKINNER. That is correct, and this statutory right, which they have been unable to obtain in negotiations for obviously good public policy reasons, they are attempting to legislate and we—as I have indicated, that aspect of the program I do not believe we can live with.

I think it puts at risk millions of Americans, and I have indicated to Chairman Dingell that I will recommend to the President that any bill that comes forward with that language be vetoed and I will argue strenuously that if there is an attempt to override it, that that not be overridden.

Senator DANFORTH. Congress would be saying as a matter of law that if you drink on the job, or if you use drugs on the job, that is all right. You have a right to retain your job?

Secretary SKINNER. That is correct. But more important than that, that would be the ultimate—not only would Congress have dictated the issue over the objection of the people that have to administer the test, but they would have, by doing that, placed in jeopardy the lives of millions of Americans. It is on that basis that I could never accept that kind of step.

Senator DANFORTH. Mr. Chairman, could I just continue?

The CHAIRMAN. If John does not mind.

Senator DANFORTH. You spoke in your comments about the House requirement about rewriting regulations and how you have already gone through litigation on existing regulations.

Would you describe to us, so clearly that anyone who is interested can understand, how the House bill would work, and why that would be a bad thing to do?

Secretary SKINNER. Well, in order to get to the point, one of the frustrations that I found as Secretary of Transportation is that the rule-making process in government is so slow.

As I indicated, or I may have indicated to you privately, I have located approximately 285 rules in the department that were started in 1986 or before. Now we are in 1989.

I am embarrassed to say that I have to do this, but I have an accelerated program to move 280 some-odd rules that are 1986 or before in origin, many of which are no longer necessary—time has passed—to at least get them through the process. We have people looking at rules that will never be affected.

I just point that out and show that, number one we are moving on that problem, but number two that the rule-making process within government is very, very complicated. It takes a long time to go through, even on an emergency basis, the fact-finding process, the analysis of the opinions and statements, put the rule into place, then have it challenged, take it through the district court process to get a ruling.

In some cases the district courts take an extended long time to rule and in fact some courts, if they do not like the rule but they do not want to take the heat of objecting to it, as Senator Hollings knows—he is an old trial lawyer—they put it in the bottom drawer and they just sit on it for a year and you get no decision whatsoever.

We now have gone through all of that process on very effective rules that we think we can live with, and they are now at the appellate stage level and in some cases there is—in the case of the one case, they have already gone through the United States Supreme Court.

Now, why should the American people pay the price and possibly even resulting in deaths, while we go through a whole new process of rule-making that, when it is all over, will be no better and probably worse than the very effective program we have, which is the cutting edge in government on this issue? It makes no sense. It is not fair. It takes unnecessary risks and it might result in deaths, and that is the reason we are so strong on maintaining our rules.

Senator DANFORTH. It would result in a whole new round of rule-making and of litigation?

Secretary SKINNER. That is correct.

Senator DANFORTH. Because whatever rule you would write would then be the basis of yet more litigation. Right?

Secretary SKINNER. Right, and also one other thing. It would also set back the planning process for the implementation of these rules. As these cases go forward at the Department of Transportation we are also working on the implementation, so there is a double effort. We are overlapping in the use of our resources.

I want to be in a position that the moment the Supreme Court says I can go ahead with random testing, I can announce implementation and move forward so that we will have no "Now that we can do it, now we take another year to try to figure out how to do it."

We are going to figure out how to do it assuming the Supreme Court is going to let us and if the risk is the Supreme Court does not let us, we will put out all that effort in vain. That is a risk, I think, of investment I have to make to be ready to go right away.

But in the meantime, industry knows we are moving forward. Industry knows, the moment the Supreme Court rules that "You had better be ready to test your work force, because we are going to require it and we are going to show you what you have to do to do it. So do not assume this is tomorrow's problem that is five years off, because it is not."

The moment the Supreme Court says yes, we want to be ready to go. That whole process in the House bill would put us back, in railroads, five years and we cannot afford it. The Ricky Gates case proves that.

The CHAIRMAN. That is the importance of your testimony here today, Mr. Secretary. Thank you. Senator McCain.

Senator MCCAIN. Thank you, Mr. Chairman. Thank you, Mr. Secretary for your efforts and the priority you have given this issue.

I agree with you wholeheartedly that we have got to move forward and frankly, I am embarrassed as an elected public official that we have an issue of such gravity, most lately highlighted by the Valdez incident—accident, tragedy—and others throughout that have been referred to here and yet we find ourselves in a situation where we are at gridlock within the Congress.

It is my understanding that not only would it be nearly impossible for the House and Senate to agree, but if the House version were adopted that you would recommend to the President that he veto a bill which in your view does not address the issue—in fact, causes us to retrogress in addressing this issue.

It is no wonder the American people lose confidence in the Congress when clearly there is a critical, crucial issue here and we cannot seem to get some kind of agreement and frankly, I think it gives validity to the arguments that perhaps Congress does not deserve a pay raise.

Secretary SKINNER. I would not go that far.

I would say though, Senator McCain, that even though the House and the Senate have not moved, as a result, at least, of my appearance before this Committee and my conversations with each of the 20 members of the Committee, that I understand the importance this Committee places on it and that was one of the things that has given me additional incentive to move forward, absent any legislation.

So I think this Committee at least can take credit for the fact that—in part—that the Department of Transportation has this as a top priority, because you have told me how you feel about it and because some of it was somewhat new to me when I became Secretary. I now understand.

So you might not get legislation but you have at least got my attention and I am moving forward. So I think on that basis you probably do deserve a pay raise.

Senator MCCAIN. I am grateful to the chairman of the Committee and Senator Danforth for their efforts on this issue. I do repeat, though, we as a Congress should be able to get together with the Administration and agree to a piece of legislation for which there is clearly a compelling need.

Mr. Secretary, is there any doubt in your mind—and you have a legal background—on the constitutionality of random drug tests?

Secretary SKINNER. Well, so far, from what I have seen, I think that in the balancing, that there are tests and procedures that could be placed on testing, that these tests will pass constitutional muster. I am convinced there is a constitutional basis, that the court can uphold testing. But you know, you do not want to answer that in the abstract, Senator McCain.

But as it relates to our rules, I believe they are constitutional and when the Supreme Court eventually reaches the issue, which I hope will be sooner rather than later, they will uphold them. That is the record before me and on that record I would make that statement.

Senator McCAIN. On an equally as important basis, and that is the preservation of reputations of innocent Americans, are you convinced that the program, as you envision it, will not cause honest, decent, nondrug or alcohol using Americans not to have their reputations impugned because of some errors in the process itself? Do you have that confidence?

Secretary SKINNER. Yes, I do, because I think that the certification process for laboratories is pretty strict and if, in fact, we define the market and we let people know what the market is going to be, then industry can get ready for it and they will have the facilities and labs in place to do it.

But we cannot ask the American industry to invest in the development of state-of-the-art laboratories when they do not know, once they have made that investment, whether the Department of Transportation is going to—because of the House language—go back and hold up for five years the enforcement of a rule, which then means that they have got these labs and no volume to justify it.

So you have got to send a consistent message to industry. Not only on testing, but also to the industry that is required to administer these rules, that it is moving forward at all deliberate speed and that we are not going “stop-start, stop-start.” With that, I think the testing will be effective.

Senator McCAIN. The state of the art today in testing, do you have confidence that that would preserve the constitutional rights and reputation and integrity of individuals from being accused, through a laboratory error, that they are drug users when indeed they are not?

Secretary SKINNER. Yes. I am not going to say that there are not going to be, in the millions of tests that occur, that there is not going to be one or two errors, but the fallback position, to double-check on those one or two, is sufficient that that is not going to happen and that confidentiality can be respected.

Senator McCAIN. I think that that is a key major issue in this whole—a key important aspect of this issue, and I would appreciate it if perhaps you could have your people submit something in writing to the Committee so that we would be able to have that for our contemplation as to your assurance that we will protect the constitutional rights of the individual, which is obviously the obligation of all of us. Do you support S. 561 in its present form?

Secretary SKINNER. With some slight modifications, I think we probably can live with most of the concepts of that bill, and we have submitted for the record our thoughts as to how it could be possibly improved.

[The following information was subsequently received for the record:]

The following information is provided with respect to measures taken to protect the rights of employees:

Reasonableness. Each of the Department's rules specifies the circumstances under which testing may be required of an employee, thereby appropriately "cabining" or restricting the discretion of the employer. Random testing, for instance, must be conducted on a statistically random basis. No employee may be singled out for testing under that program. The Department believes that these regulatory protections render the drug testing programs reasonable under the Fourth Amendment. The Supreme Court has already upheld Federal Railroad Administration rules on post-accident and reasonable cause testing.

Accuracy and protection of privacy. The Transportation Workplace Drug Testing Procedures mandate specific procedural safeguards that apply to drug urine testing. The Procedures are based on the HHS Guidelines for Federal Employee Drug Testing, but provide additional procedural detail to guide compliance by regulated entities. The Procedures contain protections to ensure accurate testing and reporting and to protect employee privacy. Examples of protections to ensure accuracy of testing include:

- Collection of samples under stringent standards to ensure proper identification, integrity and chain-of-custody of specimens;

- Use of HHS-certified laboratories which are subject to periodic inspection and open and blind proficiency testing;

- Confirmation of any positive screening result by gas chromatography/mass spectrometry;

- Reporting of results to a Medical Review Officer, who must provide an employee the opportunity to discuss a positive result and provide any information concerning approved medical use of controlled substances before the test result is formally declared "positive" by the Medical Review Officer; and

- Retention of the original sample in a secure area separate from the areas of the laboratory used for testing, so that any disputed positive can be retested.

The regulations provide for private urination, except under narrowly defined circumstances where there is good reason to believe that the employee will attempt to tamper with the specimen to nullify the test. Medical information that may be disclosed through the testing process (including employee declarations of medical drug use) is discussed only between the Medical Review Officer and the employee and must be treated as confidential. Even though the fact of unauthorized drug use is not subject to any constitutional or statutory privacy right, the regulations do treat positive test results as confidential (subject only to necessary dissemination, e.g., to the management official who must remove the employee from service or to an employee assistance program).

Senator McCain. Finally, Mr. Chairman, having been part of a random drug testing program at one time in my life, I think it is of interest to note that some who say that there is a need for a pilot program along these lines should know that we have had a pilot program. It has been in the military.

It has entailed millions, literally, of men and women in the military and the results have been that there has been a dramatic drop in drug usage on the part of members of the military, when they know that they would be subject to a random drug test, and I think it might be important at some point to have the Committee receive the results of the random drug testing that the military has conducted.

It might be well to note that we are an all-volunteer force. We have a citizens' Army today and these men and women have been engaged in this program and it has been responsible for saving millions and millions of taxpayer dollars through reductions in accidents on the job, which were prevalent in the 1970s before we instituted the program.

So at least those who want a pilot program installed, I would suggest that a pilot program has already been implemented for some years.

Thank you, Mr. Chairman.

Secretary SKINNER. Senator McCain, let me just add a thought on that. We of course within the Department of Transportation

have the Coast Guard results, and they parallel the Defense Department results. They have been five years now and we have seen drug usage drop from 10 percent into the 2 percent range as a result of these programs and everything else, and I also might add——

Senator McCAIN. At a time when drug usage in the general public was increasing.

Secretary SKINNER. I also might add that there are a number of studies that show that, if that employee gets back into the work force, that the program, the testing and the rehab, pays for itself in 18 months.

The CHAIRMAN. The military record will also show that the personal responsibility program—call it the PRP—particularly aboard ship, as Senator McCain would know, in the aircraft carriers—the nuclear, the submarines and otherwise—last year there were 414 separated as a result of random testing in that particular program.

Senator Bentsen.

Senator BENTSEN. Mr. Chairman, let me thank you for holding this meeting on a very important subject and it is obvious that some upgrading is necessary in the licensing and controls of alcohol abuse.

But I think the secretary has made some valid points and that trying to develop the methodology for alcohol testing requires a great deal of study and thought since it is quite different from drug abuse.

I would have no further questions, but to congratulate the secretary.

The CHAIRMAN. Very good, thank you, and I particularly thank you, Secretary Skinner. I think the real significance of your appearance here is to put the transportation industry on notice that we are moving.

I do not want to say moving with all deliberate speed. You have me as a witness on that one. I was at the council table in December 1952 when we argued the desegregation cases. When the school—in Brown against the Board—decision came down in May of 1954, we sat around the table with Mr. Roy Wilkins and Mr. Thurgood Marshall and the other lawyers.

Trying to respond to the admonition of moving with all deliberate speed, we said all right. Let us integrate the first grade the first year, the second grade the second year—and of course, the first grade having been already—integrated. Then the third grade would be integrated the third year along with, the second and the first grades. Then after 12 years in a deliberate fashion we would have integrated the public schools particularly in my South land.

We all agreed around the table until we got to the New York lawyers, who were awful smart and they said that that would be giving students their constitutional rights on an installment plan.

So 12 years later, nothing had happened and we had to burn Watts and Detroit and Washington, D.C. and everything else to get something moving. So hold back on that “with all deliberate speed.”

Secretary SKINNER. That is Chicago “all deliberate speed” and not New York. We move a little faster in Chicago.

The CHAIRMAN. Very good, sir. We thank you for your appearance here today.

We have our distinguished colleague, Senator Wilson, a member of this Committee and we would like to welcome you, Senator Wilson, and we would be delighted to hear from you at this time.

STATEMENT OF HON. PETE WILSON, U.S. SENATOR FROM CALIFORNIA

Senator WILSON. Thank you very much, Mr. Chairman. I am always pleased to come back to this Committee. I would be very pleased to come back as a member because I enjoyed my membership under your leadership here—leadership which you are continuing to demonstrate this morning.

I particularly want to thank you and Senator Danforth for holding this hearing. As a member of the Committee in the last session of the Congress I was as proud of the work of this Committee in this area as of anything which the Congress did and in which I was specifically involved.

I firmly believe that the overwhelming passage of the Danforth-Hollings legislation two years ago by this Committee and the full Senate marked a real watershed in the protection of America's traveling public.

I was very pleased to hear of the determination with which the secretary is seeking progress and implementation of a law that is not yet passed. I am pleased that the Executive Branch is taking it upon itself to put into effect what you and Senator Danforth and the co-sponsors of your legislation so clearly intend.

I will not go into the litany of political events which prevented this legislation from being enacted last year, but I will say for the record that I believe that the leadership of the House Public Works and Transportation Committee and the House Committee on Energy and Commerce should be excoriated for their disregard of the dangers of drug use by workers in the transportation industry. You have been eloquent and outspoken in giving admonition to them yourself.

I sat with you last year as a member of this Committee when we heard the testimony by Ricky Gates, the Conrail engineer who described the widespread use of alcohol and drugs in the rail industry both before and after the horrible, tragic, totally needless accident that occurred at Chase, Maryland on January 4th of 1987.

Sixteen people died in that tragedy, minutes after the engineer and the brakeman of a string of Conrail locomotives shared a marijuana cigarette. And moments later they ran a series of stop signals.

Mr. Chairman, I am happy that the courts have recognized that the dangers of such drug use are serious and that they pose a great threat to our society.

The United States Supreme Court has approved the use of post-accident testing for railroad workers. How much better, Mr. Chairman, if instead of simply confirming our suspicions, we actually prevent those tragedies.

The court has provisionally approved drug testing for drug-sensitive positions in the U.S. Customs Service. Both the Reagan and

Bush Administrations have pushed hard for this type of testing in all branches of the government. And I hope and I am confident that this committee will continue to exhibit the leadership that it has shown in the past in working with the administration to make real the kind of protections which common observation and common decency demand.

Most of all, Mr. Chairman, I hope that the committee can approve this legislation once again, and do so quickly, and then send it to the Senate floor for prompt consideration.

S. 561 is identical to the last Congress' S. 1041, which was approved by the Senate on a vote of 83 to 7. Although the bipartisan Senate Omnibus Antidrug Abuse Bill included the Danforth-Holings mandatory random drug and alcohol drug testing provision, key members of the House Public Works and Transportation refused to include similar language in either the House Drug Bill or to permit it to survive the conference report.

Testing transportation workers for drug and alcohol abuse should be law. And the Senate needs to send another clear message to the House of Representatives that the American traveling public should not have to worry whether their airlines pilots or bus drivers or railroad engineers are substance abusers.

Please be assured, Mr. Chairman, that I will continue to work with you and Senator Danforth and the other members of the committee to assure that this bill does become law in the 101st Congress.

I might say that, in addition to the testing to which Senator McCain alluded, we did include—and it managed to survive conference in last year's Omnibus Drug Bill—a pilot program whereby in four states, first-time driver's license applicants will be submitted to mandatory random drug testing for a year after they first are granted a license. The purpose of that legislation is, again, to stop the kind of carnage that has resulted from substance abuse.

The National Transportation and Highway Safety Administration has indicated that as many as 22 percent of our annual auto fatalities can be traced to drug-stoned drivers.

What we are trying to do is keep those kids clean, at least for a year; and to make the point while we have leverage—and I have never met a 16-year old who did not want a driver's license—that they have a privilege under the law, not a right, but a privilege to drive legally. Or they can choose instead to use drugs illegally, but that they cannot do both.

So, Mr. Chairman, I think that what you have undertaken here is about as important to the safety of the American traveling public as any piece of legislation that has come along.

I must say that I hope that we will find a greater understanding and a greater sensitivity in the House of Representatives, but perhaps only the American traveling public can bring that about.

I thank you for the privilege of testifying before you, and I again commend you for your leadership.

The CHAIRMAN. We thank you, Senator Wilson, for your presentation, your concern and your leadership on this score. You and I are in step on this one.

Senator Bentsen.

Senator BENTSEN. I have no questions. I am certainly in accord with the statement of Senator Wilson.

The CHAIRMAN. Thank you very, very much. Indeed, we appreciate it.

Senator WILSON. Thank you.

The CHAIRMAN. Congressman Luken, we welcome you. We note your leadership, Congressman, and your bill reported out of your committee. We would be delighted to hear about it this morning and hear from you.

STATEMENT OF HON. THOMAS A. LUKEN, U.S. REPRESENTATIVE
FROM OHIO

Mr. LUKEN. I thank you, Senator.

I have been able to sit in on some of your hearing this morning, and I notice we got a little attention. And I would be glad to respond. As a matter of fact, I think it is important that we do join in discussing these issues, because there is no question that we are all aiming for the same objectives, and that we have more in common, I believe, than we have that separates us.

I think it is unfortunate, for example, that Secretary Skinner has rather truculently reacted to our legislation and scored it, as he says, and has emphasized those things which divide us.

I congratulate you for what you have done. As a matter of fact, I might start off by saying that I voted for the instructions to the conferees, which would have approved the matters that you are talking about today.

I do not believe you and I, Senator, have that much of a difference, with reference to the means of getting to this end. We do have a problem. I believe that Senator Wilson suggested that the Commerce Committee members disagree with us—and I think he lumped them together with the Public Works Committee members in our body, but I do not think that is quite true. We passed a bill in our jurisdiction, which is railroads. We have some differences, perhaps, with reference to rehabilitation and other items, which I think could be worked out.

But the Public Works Committee has passed no legislation, has taken no action, and they have the jurisdiction over the airlines and the highways. And that is a problem that we will have to work out. I believe it can be done—I mean, I hope that it can be done, because we now do not have the time problem, which we did have last year. You will remember, Senator, when we met in the closing days of the 100th Congress, late one evening with the conferees. And I thought we were getting somewhere, but time just did not permit us to reach an accord.

Our bill is fiercely and almost unanimously supported by members of the Energy and Commerce Committee. And it is a bipartisan bill, as the Senator knows. The ranking minority member of our Energy and Commerce Committee and of my subcommittee are co-sponsors of the legislation, and they believe very strongly that this is a strong bill; not a weak bill by any means.

Let me start off with a reference to the question of alcohol testing and starting all over. I was kind of shocked to see Secretary Skinner's statement that he objected to our bill because it would

require them to start all over on the regulation of alcohol and drug use.

Up until today, the Transportation Department has taken the position that alcohol should not be regulated. Six weeks ago, the Transportation Department testified before our subcommittee. When we asked if it was not weakening their proposal that it did not include random alcohol testing, we were advised by Secretary Skinner's representative that alcohol only involved one-half of one percent of employees and was thus statistically insignificant, and we should not consider it.

Now, today, that same secretary, the same department, says that we should include alcohol; that he is going to introduce regulations at this late date—I say late date because this has been going on for a long time—and he is going to include random alcohol testing.

I think that Mr. Skinner's announcement today is very good, but it suggests another flaw, perhaps, in his proposal that we leave everything to the Department of Transportation and not legislatively prescribe what should occur; because then it is going to be up to the whims of the Secretary or another secretary, who may change his mind, as apparently Secretary Skinner has done in the last couple of weeks.

The administration has taken the odd position that legislation is not necessary. I have not heard it spelled out from the administration as to whether that would mean that they are not in favor of the Senate legislation, also.

They seem to think that any legislation would mean that they would have to start all over in drafting regulations.

Well, Senator, and members of the committee, I suggest that if the Supreme Court approves random testing as a concept, as a principle, then it is going to approve random testing. And that is not going to be vitiated by some future action that changes some incidental parts of the regulation. Therefore, I do not think that the position of Secretary Skinner can actually be sustained.

I hope that we do not continue to have an all or nothing approach on the part of people who are involved in this debate. If we cannot, because of the difference of the structure of the industries, of the trucking industry and the airlines as opposed to the railroad industry, achieve drug-testing legislation, with reference to those other industries, I would hope that we can move forward in the rail area. And given the time that we now have, most of the 101st Congress before us, if we see that we cannot, I will work with you. I will continue to vote for and to press for comprehensive drug testing for all transportation modes, as I did recently, when I sent letters to the chairman of the Public Works Committee, and the other subcommittees that would be involved in this matter, and suggested that they also pass drug-testing legislation.

Before concluding, I want to just describe our bill, which has been described as weak. Our bill is premised—and this is the bill that passed the full committee a little over a week ago—on the fact that rehabilitation can and should play a major role. I think everybody agrees with that.

The House bill, contrary to what has been stated here by the witness, at least in part, requires employees who test positive for either drugs or alcohol to be automatically suspended without pay

and referred to a rehabilitation program approved by the Secretary. That is not proposed by the administration nor, I believe, the Senate bill.

If an employee successfully completes such a rehabilitation program and completes community service requirements, he will be reinstated. For three years thereafter, such employees are subject to testing on a daily basis, if it is deemed necessary.

If an employee fails to complete his rehabilitation program or tests positive within three years after the completion of rehabilitation, he is automatically terminated.

Now, Senator, I do not think that that is a weak program. As a matter of fact, I think it accomplishes the same thing that the Senate is trying to do.

Under existing rules, employees can be suspended, can be fired, if they test positive. Under existing rules. But Union Pacific has told us that their surveys indicate that such railroad employees who are suspended or fired will be back on the job within an average of nine months.

So I presume that if the administration proposal or the Senate proposal would go into effect, that leaves the option to the railroads to terminate or not to terminate these employees. I assume that the situation would be similar to what it has been. So that the average employee—I assume that includes those who do not come back at all—is returned to duty within nine months.

Obviously the railroads need good employees, and they do not terminate a one-time offender permanently. And that makes good business sense, and we think it makes good business sense. And it makes good sense from the standpoint of individual civil liberties, which would make, perhaps, our bill more easily sustainable in court than either the administration regulations, which have not been approved, or perhaps the Senate legislation, whatever you finally arrived at, if that is a difference ultimately.

So I do not think that those differences are going to result in anything dramatically different. And that is the reason that I and many others of us, who support the bill which is in the House, voted for the instructions to the conferees to support your legislation in this regard.

I do think that drug testing is important enough that we should have enduring regulations based upon legislation codifying those regulations so that they cannot be changed capriciously, and so that they will appear to a reviewing court in a more acceptable light so that they will be approved.

So, Senator, I apologize, perhaps for responding in a direct manner, but I think it is the best way to approach it. And I am appreciative that the Secretary and others have gone right to the heart of the matter in getting to the differences.

I cannot imagine that the President would veto a bill, which is as I described it. Because frankly, I think it is the consensus that rehabilitation of this kind—one time, for the first-time offender, but automatically fired for the second offense—I think this is reasonable and will bring about a better and safer transportation work place.

Thank you, Senator.

[The statement follows:]

STATEMENT OF HON. THOMAS A. LUKE, U.S. REPRESENTATIVE FROM OHIO

Up until today the administration did not require random testing for alcohol in its regulations. The Transportation Department witness at our hearing 6 weeks ago, said that they had not considered random alcohol testing important enough; statistics didn't support alcohol testing.

Before *Valdez* that was a curious position, if not absurd. Right now it is shocking.

It is gratifying that the Senate and House agree that alcohol use is a menace and testing must be included in new legislation. Proof is abundant, but I refer you to a 1979 FRA study showing that 19 percent of railroad employees were "problem drinkers" and 13 percent of operating employees drank while on duty at least once during the study year. NTSB studies also show widespread alcohol usage. Ricky Gates, one of the principals in the Chase, Maryland accident, testified before this committee that he knew of workers frequently coming on railroad duty with cases of beer.

The administration is preaching against legislation, saying it's not needed. That's what they said last October, and again last week Secretary Skinner reiterated that unique position. Well, every expert we know on the subject is in violent disagreement. Safe Travel America, which consists of parents and friends of victims of accidents caused by drugs and alcohol in the transportation workplace has forcefully, and convincingly, told us that legislation is needed to withstand court tests and provide an enduring solution. In fact, this administration's record has been lacking in vital areas.

When it first implemented its drug testing regulations, DOT provided for testing after serious accidents, and set property damage requirements (\$500,000 for non-impact accidents) which will trigger testing. Experience has shown that the thresholds set by DOT render this ineffective.

In fact, some persons, despite the overlapping and conflicting jurisdictions of various standing committees in both bodies, as well as the differing structures of the trucking, railroad, and airline industries, nevertheless take an "all or nothing approach." Sure, we'd like to have the same stringent safety requirements contained in our bill, H.R. 1208, apply to trucking and airlines. But, if we can't get it then let's settle for a vast improvement in railroads and let that be an example, a model, for the others.

Some say our bill is not tough enough because it provides for rehabilitation, while the Senate does not require that option. I don't see how that difference, when we examine it closely, is an insuperable obstacle to reaching an agreement. On the contrary, I believe that these are areas where, with time, we can come together.

One reason for my optimism is, again, that the results of the different systems described in the administration regs, the Senate bill, and our bill are strikingly similar.

Our bill is premised on the fact that rehabilitation can and should play a major role in this area. The House bill requires employees who test positive for either drugs or alcohol to be automatically suspended without pay and referred to an approved rehabilitation program. If an employee successfully completes such a rehabilitation program, and completes community service requirements, he will be reinstated. For three years thereafter, such employees are subject to testing. If an employee fails to complete his rehabilitation program, or tests positive within three years after completion of rehabilitation, he will be automatically terminated.

As sensible as that program seems to be there are critics in the administration and elsewhere who grumble that a worker should be fired upon positive testing, or at least the railroad should have that right.

Well, the railroads have that right at present yet experience shows that the average worker fired for drug use is reemployed by the railroad within 9 months. If our bill would result in getting that first time offender back a little quicker, after rehabilitation, under the strict terms of H.R. 1208, we think the prospects for successful rehabilitation are greatly enhanced.

Further, our bill imposes both civil and criminal penalties for violations which may occur, such as altering test samples or falsifying test results. We also have penalties for employees who avoid testing and for carriers which fail to perform the testing required by the bill. The Senate proposal has no similar provisions. We believe these sanctions are necessary to put some teeth into the legislation. Unless we have strict compliance from all affected parties—whether employer, employee, or laboratory—the effect of the legislation is meaningless.

Finally, I want to stress what is the most significant area of difference between our bills. Simply put, the Senate proposal leaves the majority of decisions in this area to the Secretary. This includes what kind of testing will be performed, what

procedures will be followed for the collection, handling, and storage of samples, what discipline will be imposed on employees for violations, et cetera.

I have respect for Secretary Skinner and his staff at DOT. However, we cannot leave all of these decisions in the hands of administrations which are subject to regular and dramatic change. For example, both the Senate proposal and the House bill mandate this conclusion. We believe that a proper rehabilitation program can benefit the employee, and ultimately the industry and the public, and that our legislation provides significant incentives for employees who have a drug or alcohol problem to seek treatment.

Another major concern today is the jurisdictional problem which has arisen in considering drug and alcohol testing legislation in the transportation workplace. The Senate proposal being considered today does not cover just railroad workers, but includes truckers, bus drivers, and airline employees. I understand the committee may even consider similar measures for maritime employees.

I support the scope of coverage of the Senate bill and support testing for all transportation employees.

However, our subcommittee and committee only may exercise jurisdiction with respect to railroads. The House Committee on Public Works and Transportation has jurisdiction with respect to the trucking and airline industry.

This is an unacceptable dilemma. While I personally support testing for other transportation modes, the committees of jurisdiction over other transportation modes have not acted. We have been in contact with Chairman Anderson, as well as Mr. Hammerschmidt, and the chairmen and ranking members of the appropriate subcommittees, to encourage efforts, similar to our bill, for other transportation workers. Unfortunately, our inquiries and efforts have not been successful.

While I will continue to do what I can in this regard, I believe it would be tragic if the House and Senate failed to reach an agreement with respect to the railroad industry.

If we jointly pursue the common ends, and do it diligently, we will have that precious commodity, time, which we lacked last year. I am optimistic.

The CHAIRMAN. The committee thanks you. And I like the direct approach that you use, because that is all I understand. Let me say this, Congressman, with respect to suspension after a first offense, in that conference, you say it would be suspension without pay. My memory of the House version was the suspension was with pay while they were being rehabilitated.

Mr. LUKEN. No, sir, that is not the case. And I do not think it was misstated at the conference. But the facts were that it was without pay, in the bill last year and in the present bill. I am getting a nod of the head from my boss who is here. And so I am reassured that I might be correct as far as what our bill provides.

But I think that what you are saying demonstrates or emphasizes what I just observed. We did not have enough time there to get an understanding. Many issues flew by in a relatively quick way and we could not come back the next day to try to resolve it.

The CHAIRMAN. Well, you see the point, they did not really want to destroy the incentive and effectuation of a discipline that random drug testing would give. In other words, if you have got nothing to lose, who worries about random testing? You know you have got your job, and that you will be rehabilitated, so, let us move on down and have another joint, or whatever they call it. That would forego any kind of discipline really being developed on that mandatory rehabilitation.

Have you estimated the time and the cost of what is envisioned when you say rehabilitation?

Mr. LUKEN. Well, I think most of the railroads—and I think this is one reason we are able to move easier in the railroad area than in the other areas, is because the railroads have done some pioneering work in this drug-testing area. I think they do have experi-

ence; and I do not believe the cost would be significantly different, because they are already working in this area.

And as far as rehabilitation is concerned, that would be nothing new to them at all. If there are greater numbers, I do not think they would be significantly greater numbers.

We would urge the Secretary to draft rules to show that that program would be comprehensive and would be complete and demanding. That is what really appeals to me about this legislation, rather than leaving it up to the railroads. Although many of the railroads have been doing a pretty good job on this subject, I think we are codifying it and improving it.

The CHAIRMAN. Very good, sir. We appreciate very much your appearance here this morning.

Mr. LUKEN. Thank you, Senator. We look forward to working with you and getting some legislation we can agree on.

The CHAIRMAN. I am confident we can get together.

With respect to the introduction of Safe Travel America, we have Mr. Arthur Johnson and Roger Horn. Senator Mikulski wanted to be here in person to welcome both. She is unable to be here due to a previous commitment.

I would like to extend, on her behalf, the greetings to two of her constituents representing Safe Travel America. The two are appearing before the Commerce Committee to share their views regarding S. 561, which would provide, of course, for testing for the use of alcohol and controlled substances by safety-sensitive employees of the transportation industry.

They have been leaders in this particular regard. We welcome you both here this morning. We are glad to see you again.

Who wants to go first? Mr. Johnson, yes.

STATEMENT OF ARTHUR W. JOHNSON, CHAIRMAN, SAFE TRAVEL AMERICA; ACCOMPANIED BY ROGER HORN, PRESIDENT

Mr. JOHNSON. Thank you, Mr. Chairman.

For the record, my name is Arthur Johnson. I am chairman of Safe Travel America, Incorporated. And with me to share in the discussion period which we may have is Dr. Roger Horn, the president of Safe Travel America.

I hope that what we have to say will not seem too much like, "here we go again," or a broken record. We have now been before this committee a number of times, before the House, working with the Administration, working, as you say, with Senator Mikulski and others, for over two years, since our daughters and 14 others were killed in a needless tragedy caused by impairment of crew members from the use of illicit drugs.

Having said that, I will appear as many times and as long as necessary to keep the work going that we have started; to assure that somehow we will get correction by legislative action for the protection of people from needless tragedies such as that that killed our children.

We have organized Safe Travel America now as a not-for-profit corporation for the specific purpose of working with the Congress and with the States and with the Administration, with the public, and appearing in every forum we can on the urgency of this prob-

lem of deterrence and prevention of the use of alcohol and controlled substances by those persons in the transportation industry responsible for safety: theirs and ours.

We have, perhaps unfortunately, become known as an organization concerned only about drug testing. This is not true. We are anxious to get this problem of testing for drugs and alcohol solved. There are many other issues of transportation safety in the rail industry and in other areas of transportation in which we are deeply interested. And we will focus upon those as soon as time permits.

You have asked me, Mr. Chairman, to comment specifically on actions taken since hearings were last held before this committee. I will do so. And in so doing, I would like to remind you of one frightening statistic. Since the Chase crash, there have been, in the railroad industry alone, accidents at the rate of one every 10 or 11 days, attributable to drugs and/or alcohol. These accidents have been serious, some resulted in deaths, some in injury, and all in considerable material damage.

Nothing has taken place to compare with the seriousness of the Chase crash, but in the absence of measures to correct the situation, who knows when another Chase may occur?

I would like to remind you that at the last hearing before this committee the perpetrators of the Chase crime, Messrs. Gates and Cromwell, both testified about the frightening frequency of use of drugs and alcohol in the railroad industry.

The Department of Transportation last year issued regulations, within its existing authority, to require the testing of employees for use of illicit drugs. For some reason not clear to us, these regulations have not included testing for alcohol, even though there is ample evidence that use of alcohol is rampant within at least some parts of the transportation industry.

We, in Safe Travel America, were invited to and did testify at many of the hearings that were held by the DOT before those regulations were issued. In all cases, my colleagues and I spoke very strongly in favor of the inclusion in the regulations of a requirement for testing for both alcohol and illegal drugs. Alcohol was not included, and I consider this to be a serious deficiency in those regulations.

However, I further question the use of regulations alone to solve this problem. Regulations, as has been said by others earlier this morning, can be subject to the whims and the different views of successor administrations, and can be changed with relative ease.

Legislation, on the other hand, legislation such as that that you are considering in your committee, if, indeed, it ever is enacted, could be expected to be more durable, less subject to change, and would give the Department of Transportation the statutory authority it needs to address the question of both drugs and alcohol.

However, should it again be impossible to get appropriate legislation through the Congress, I would encourage the DOT to examine carefully the regulations as they now stand, and to consider their amendment to include testing for alcohol.

Now, you, Mr. Chairman, and the ranking member, Senator Danforth, have introduced S. 561, identical to the bill that the Senate passed by such a strong majority in the last session. We supported that legislation, and we certainly applaud this committee and the

Senate for its very strong expression of its views on the requirement for testing: the testing of people, only those in safety-sensitive positions, under conditions of pre-employment, post-accident, periodic physicals, reasonable suspicion and, most important in our view, random.

We have been, and continue to be, particularly strong on the requirement to include random testing as by far—and it has been well demonstrated that it is by far the best deterrent to the use by employees of alcohol or illegal drugs on or off the job.

As strongly as we support S. 561 and its predecessor in the last Congress, it is our view that this bill could also be expanded to cover some areas that are not otherwise covered in legislation or regulation. I refer in particular to the maritime industry and the pipeline industry.

Everyone is familiar with the devastating results of the *Valdez* accident in Alaska, which is alleged to have been caused by the impairment of the captain due to the use of alcohol. That tragedy did not result, fortunately, in the loss of human life, but just look at the impact upon the ecology as a result of the inattention of that captain with respect to his duty.

I would like to comment upon the alternatives available to you, Mr. Chairman, in the event that it is not possible to promulgate S. 561 into law in its existing or amended form. All of us in this room are aware of, and mention has already been made by a number of witnesses before me and perhaps many after me about the situation at the end of the last session of Congress, when a concerted effort was made to include the Senate bill requiring testing for drugs and alcohol in the Omnibus Drug Bill.

I am well aware of the strong position which you, Mr. Chairman, and others in the Senate took on this issue. I listened with admiration to your speech on the floor in the Senate in the closing hours of the session, in which you made crystal clear your opinions as to the cause of failure to include testing in the Omnibus Drug Bill.

However, the House is now considering, as we have already heard this morning, a bill authored by Congressmen Luken and Whittaker, a bilateral bill, requiring testing of railroad employees only. We, in STA, have not supported that bill precisely as written, but we certainly support the motivation behind it. We hope that if a bill is indeed passed by the House, and if, it includes only rail transportation, that there will be opportunities in conference to make some modifications which we consider to be important.

We have discussed with staff members of both the Senate and the House the views that we have that we believe would be improvements on the House bill, which we fully expect will pass the House.

I am unaware of any effort being made in the House Committee on Public Works and Transportation to address this issue for the other modes of transportation for which that committee has responsibility. We have discussed this matter with the members of that committee and with staff members and have the same frustrations, I must say, that you have.

This time we have the opportunity to have bills pass both the Senate and the House relatively early in the session, just as you were early last time. But I fear that we may be going down the

same road to an impasse, unless there is a disposition on the part of conferees from both houses to reach some kind of agreement on legislative action. We need such action.

If we can only achieve legislation affecting the railroad industry at this time, I urge you to give careful consideration to passing legislation which addresses at least that part of the problem. If we can have a prototype, an example, a successful piece of legislation that will require proper testing in the railroad industry, I suggest that this in itself would be useful, and that it might, indeed, lead the way to appropriate legislation at a subsequent time which would address other modes of transportation.

We cannot continue to have the frightening rate of tragedy attributable to causes which are correctable. The authority to correct the situation rests with the Congress; the action that is needed should be taken by the Congress. I therefore encourage you to look at an opportunity for conference that may cause you to retreat slightly from your desire to cover all modes of transportation in a single piece of legislation, but would have tremendous lasting and useful effect for transportation safety, and which could go a long way toward avoiding another Chase.

We in Safe Travel America have heard many of the comments made in various places about the accuracy of testing, the adequacy of testing, the protection of individuals and so on. We are satisfied that testing can be carried out properly, including the certification of laboratories in accordance with accepted standards—standards promulgated by the government, with insistence upon testing accuracy, insistence upon second tests when positive results are indicated, and that second test must use, as is provided by your legislation and others, the most sophisticated techniques for testing.

Confidentiality of information must be assured; this can be done. There needs to be provision for sanctions with respect to people who break the law, and also for rehabilitation and return to duty whenever that is reasonable and possible.

Clearly, you in the Senate together with your colleagues in the House have got to resolve this issue of the availability of and the appropriateness of rehabilitation, the impact upon employees and employers of having rehabilitation programs mandated or just available. This requires very careful consideration and careful wording.

I would say that we in Safe Travel America support the rehabilitation of rehabilitatable employees. We do not support a situation of automatic rehabilitation without penalty for deliberate breaking of rules, regulations and laws by those employees.

Recently we have had indication of the attitude of the Supreme Court. The 9th Circuit, at the request of rail labor and the ACLU, declared unconstitutional the Federal Railroad Administration regulation requiring post-accident testing of railroad employees involved in accidents.

Many of us in Safe Travel America filed "amicus" briefs in support of the government in appealing the 9th Circuit decision to the Supreme Court. We were pleased, very pleased, indeed, by the ruling of the Court, which upheld the government's appeal by a strong vote of 7 to 2, affirming the legality of post-accident testing.

Isn't it ironic, Mr. Chairman, that had that regulation not been in place on January 4th, 1987, the crew who perpetrated the death of my daughter and Roger's daughter and 14 other people would not have had to be tested, and the official cause of that tragedy would not have been established in any official manner?

As much as STA applauds and supports the strong position which you, Mr. Chairman, and Senator Danforth, and other members of this committee, have taken, we must share with you our frustrations; indeed, our annoyance with the Congress as a whole, which in spite of the compelling requirement for transportation safety, was unable to take action because of the influence of some elements of the transportation industry, and the unwillingness of a small number of members of the Congress to consider seriously a solution to this crying need.

I appreciate very much the opportunity to tell you very candidly how strongly we feel that a start must be made. If that start requires that you take action initially, as I mentioned above, with respect to rail only, I urge that you give at least very careful consideration to that possibility, keeping in mind that we cannot let another session of the Congress go by without legislation that will keep the same kinds of tragedies that caused Dr. Horn and me to be here today from happening.

Thank you, Mr. Chairman.

The CHAIRMAN. Well, we thank you, Mr. Johnson and Dr. Horn.

Do not let that frustration develop into disillusionment, because the interest, as I see it now, is even greater; it has not diminished.

You do not have a larger attendance here this morning because it is one of those days. While we have been listening to witnesses, I voted twice in the Intelligence Committee, where Senator Danforth is, already this morning. And I have given a proxy on the conference with respect to the dire emergency supplemental. I am vote-wise in four other meetings right at this minute. That is what the pressure is like on all of these other Senators.

But that should not indicate that there is a lack of interest or somehow we have forgotten the Chase incident or the growing body of evidence that shows that we are on the right track.

As you indicate, we are not going to just say we must have it all. We are not going to just accept regulation of railroad employees; we are going to include airlines and everything else. We are going to press for it all. But we use each as an example, as the Coast Guard has; as the testing with our nuclear-involved personnel within the Department of Defense; as our air traffic controllers have proven with random testing. And private industry now is coming in from time to time.

So it is a proven approach, and you give the best, most meaningful testimony of any that appears before us.

Dr. Horn, did you want to add anything to that this morning?

Dr. HORN. Very little, Senator Hollings. I think Mr. Johnson has made our case. If I could leave a thought with you. We really have three things to urge on the committee. The first is, your bill is a multi-mode bill. We would urge you to consider making it fully multi-mode by covering any remaining federally-regulated modes of transportation that are not now covered; for example, shipping and pipelines.

Secondly, we would urge you as you reconsider the already excellent language of the bill to consider those aspects in which the coverage of the various modes can be made completely symmetric. There has been criticism in the other body that some modes are treated more stringently than others. I think that is easily rectified, and that argument can easily be taken away.

And then finally, we would urge you to get the bill marked up and out of the committee and onto the floor and debated and passed as soon as possible so that it can get to conference as quickly as possible; and that there the will of the Senate can be exercised in being willing to conference separately with the various committees, and to take this thing one step at a time. If we cannot get the whole thing the first time, let us get the whole thing one step at a time, but let us get started on it before more people are killed.

The CHAIRMAN. You have already seen the overwhelming support by the votes we have had on this side. You are working over on the House side, I can tell it by the testimony already today.

Mr. JOHNSON. Indeed we are. We are trying.

The CHAIRMAN. Well, you are having a good effect over there. Keep it up; it is worth it. We are sorry to have to put you through it, and we are frustrated ourselves with the slow pace of things up here, but I think we are picking up now.

Senator Rockefeller.

OPENING STATEMENT BY SENATOR ROCKEFELLER

Senator ROCKEFELLER. I agree with you, Mr. Chairman, things are beginning to pick up now, and of course there are reasons for that.

The CHAIRMAN. Thank you for holding this hearing today to focus attention on a frightening problem—drug abuse by employees who are entrusted with the traveling public's safety. I greatly appreciate the chairman's leadership on this issue.

I don't think that anyone would dispute the absolute right of the public to be protected from the consequences of employee drug and alcohol abuse when they board a plane, train, or other form of conveyance. When we take public transportation, we are relinquishing control—and entrusting our lives and our families' lives—to someone else. And I, for one, would not willingly entrust my life, or the lives of my family, with someone who is drunk or drugged.

I believe that we must have the maximum deterrent to keep drugs and alcohol use out of the transportation workplace—including random drug testing for those in safety related positions. I have also expressed some concerns in the past about the legitimate civil liberty concerns raised by labor representatives and I hope we can address these concerns in the legislation.

I see that we have before us today a range of witnesses with the full spectrum of positions on drug testing. I am here to listen to the witnesses.

I am particularly looking forward to hearing from Secretary Skinner to learn more about the Department of Transportation's plans to implement the Department's drug testing rule this December. I also would be interested in hearing from Secretary Skinner

about the results of DOT's testing of safety-sensitive employees—which was started in 1978—and any problems that have arisen in implementing a random testing program.

The Chairman, I appreciate your work on this issue and believe that we have a responsibility to safeguard the lives of the traveling public.

I do not have any questions of the two gentlemen.

The CHAIRMAN. Senator Exon.

Senator EXON. Mr. Chairman, thank you very much.

I just want to take a moment to compliment the two witnesses who are currently before the committee. You have been of immeasurable help to us as we move forward on this. And it is sad that we have to have tragedies before we act, but at least we are acting now.

And I want to say that, as one senator, I appreciate very much the cooperation we have had from your group to address a problem that we hope will eliminate any tragedies in the future such as the one that mobilized you to action.

Thank you very much, gentlemen.

The CHAIRMAN. Thank you very much, both of you here this morning.

Mr. JOHNSON. Thank you, Mr. Chairman.

The CHAIRMAN. We next have a very important panel. Mr. Richard E. Briggs, executive vice president of the American Association of Railroads; Mr. William R. Ward, the chairman of the board of the American Trucking Associations; Mr. Gene Bergoffen, the executive vice president, National Private Truck Council; Mr. Joseph Farrell, president of the American Waterway Operators; and Mr. Jerry T. Verkler, senior vice president, Interstate Natural Gas Association of America.

Now, we have on these panels a three-minute rule. Your statements will be included in their entirety. And you can well note from the previous testimony, our bill covers railway, aviation and trucking industries, but not the maritime or the pipeline industries. We wanted to get the reaction on the record with respect to the major maritime and pipeline concerns.

So we appreciate these witnesses being with us here this morning. I will start the way as it is on the list here.

Mr. Briggs, we will start with you, sir.

STATEMENT OF RICHARD E. BRIGGS, EXECUTIVE VICE PRESIDENT, ASSOCIATION OF AMERICAN RAILROADS

Mr. BRIGGS. Thank you, Mr. Chairman.

You and your colleagues are to be commended for your continuing commitment to the elimination of drug and alcohol abuse as a potential threat to public safety in the transportation industry.

Under your leadership, the Senate passed a measure similar to S. 561 in the 100th Congress, and we know that you will take decisive action again in the 101st Congress. We offer our support, and we intend to cooperate in any way which will prove beneficial.

I understand my statement will appear in the record of the hearing.

The CHAIRMAN. That is right.

Mr. BRIGGS. So I will restrict my comments to just a few points.

One, we strongly support the provisions of S. 561, which would permit the continued implementation of the existing event-initiated testing already structured under federal regulations. These judicially-sanctioned programs have been in place for over three years. The persons subject to those regulations are aware of their rights as well as their obligations, and we have no knowledge of significant abuses or unwillingness to cooperate.

Two, the random testing regulations adopted by the FRA on November 21st, 1988, have been challenged by rail labor in federal courts. Congress has a significant opportunity to make a decisive difference in the outcome of that litigation. There should be a congressional finding that public and rail employee safety must be protected by a random-testing program, in view of the demonstrated incidents of drug use by rail-operating employees.

Three, under the existing schedule, the railroads must file their random drug testing programs by October 2nd; implementation takes effect for the major railroads on January 16th, 1990. According to the best information available, we believe we can meet those deadlines.

Four, while we support the principle of random testing for alcohol and believe that an aggressive attack on both alcohol and drug abuse in the transportation industry is essential, we also believe that the Department of Transportation should be given greater discretion in structuring a random alcohol-testing program along with a random drug testing program.

There are differences, particularly in the methods of collection and in the methods of treatment between drug and alcohol abusers. The results of FRA's mandatory post-accident testing indicates a significant difference in the frequency of positive alcohol tests compared to positive drug tests.

If, in the future, the rate of detected alcohol use does not justify random testing, DOT should have the latitude to focus that program solely on drugs.

Five, we recommend one minor modification to S. 561 to permit DOT to make necessary modifications to the HHS guidelines. In some respects, they are simply not applicable to operating transportation companies, and cite different laws.

Finally, we support passage of a comprehensive bill covering all modes of transportation. More lives will be saved by far by random testing of truck drivers than will be accomplished by random testing of rail workers simply because truck drivers have to operate in a much more congested environment with little or no supervision and have considerably more control over the direction, speed and braking of their vehicles.

Moreover, there is little equity in imposing an expensive set of rules on one mode while allowing their main competitors to escape such controls.

Thank you.

[The statement follows:]

STATEMENT OF
RICHARD E. BRIGGS
EXECUTIVE VICE PRESIDENT
OF THE
ASSOCIATION OF AMERICAN RAILROADS

BEFORE THE
SENATE COMMITTEE ON COMMERCE,
SCIENCE AND TRANSPORTATION

ON

S. 561

My name is Richard E. Briggs. I am the Executive Vice President of the Association of American Railroads. The AAR is pleased to be afforded the opportunity to testify in support of S. 561 which would direct the Secretary of Transportation to adopt regulations requiring railroads to implement non-discriminatory, random testing of railroad employees performing safety-sensitive functions for the use, without lawful authorization, of alcohol or controlled substances.

Mr. Chairman and Senator Danforth, you and your colleagues in the Senate are to be commended for your continuing commitment to the elimination of drug and alcohol abuse as a potential threat to public safety in the transportation industry. Under your leadership the Senate passed a measure similar to S. 561 in the 100th Congress and we know that you will take decisive action again in the 101st Congress. We offer our support and intend to cooperate in any way which will prove beneficial.

The AAR has expressed continuing support for efforts to require the testing of rail employees in safety-sensitive positions on a random non-discriminatory basis. While existing drug and alcohol testing rules represent a major step forward in combating drug and alcohol abuse in the work place, it is apparent that additional incentives must be put in place to deter the use of drugs both on and off the job. Users or potential users do not go to work with the anticipation that there will be an accident that triggers mandated testing. The fact that there must be an intervening event to trigger testing somewhat dilutes the deterrent effect of those rules. Thus, while the existing regulations are valuable tools in our efforts to combat drug and alcohol use, legislation providing an additional disincentive for their use, in the form of random testing is essential. We encourage and support your endorsement of random testing as an essential tool in ensuring employee and public safety.

Following the time that the issue of drug testing was under intense scrutiny in the 100th Congress, there have been several significant developments. In March of this year the Supreme Court upheld the drug and alcohol testing regulations adopted by the FRA in 1985. The shadow of doubt cast by the decision of the U.S. Court of Appeals in the 9th Circuit has been removed.

Those regulations adopted in 1985 require testing of all train crew members and certain others who may have contributed to train accidents which exceed certain thresholds. Testing is required following a train accident that involves a) a fatality, b)

the release of a hazardous material resulting in an evacuation or a reportable injury, or c) damages to railroad property of \$500,000 or more. Testing is also required if the accident involves a collision with a reportable injury or damages to railroad property of \$50,000 or more. Even if there is no accident, testing is required if there is a fatality of an on-duty employee in connection with the operation or movement of a train.

The regulations upheld by the Supreme Court also authorize railroads to administer tests a) following accidents or incidents which do not meet the thresholds established for mandatory testing, b) following violations of certain railroad operating rules, and c) upon reasonable suspicion based on corroborated observation.

While not the subject of judicial scrutiny, railroads are required pursuant to the rules adopted in 1985, to administer pre-employment drug tests to all qualified applicants for employment in positions covered by the Hours of Service Act.

We strongly urge that Congress not change the existing event-initiated testing or reasonable-cause testing already structured under Federal regulations. These judicially sanctioned testing programs have been in place for over three years. The persons subject to those regulations are aware of their rights as well as their obligations and we have no knowledge of significant abuses or unwillingness to cooperate.

On November 21, 1988 the Federal Railroad Administration published final regulations in the Federal Register requiring that railroads conduct random testing of employees covered by the Hours of Service Act for the unauthorized use of specified controlled substances. In compliance with those regulations, the railroads are currently developing detailed plans to be submitted to the FRA for approval. For Class I railroads, the plans are to be submitted no later than October 2, 1989, and implementation of approved plans must begin by January 16, 1990.

Under these plans the railroads will be required to select employees for testing on the basis of objective non-discriminatory sampling techniques without prior warning to the employee. The selection process must not permit subjective or discretionary selection by supervisors. As a part of the phase-in of the random testing plans, each railroad is required to administer a number of tests equal to at least 25 percent of the target population during the first year. In each subsequent year the number of tests must equal 50 percent of the target population. FRA has announced that it will examine the results of the random testing experience to determine whether that level of effort can be modified in the future.

Incorporated into the FRA regulations are the "Procedures for Transportation Workplace Drug Testing Programs" which were issued by the Secretary of Transportation on November 21, 1988. Those procedures adapt and implement the safeguards previously

established as the "Mandatory Guidelines for Federal Workplace Testing Programs" by the Alcohol Drug Abuse, and Mental Health Administration (ADAMHA) within the Department of Health and Human Services. The DOT guidelines set forth requirements for privacy, specimen collection, chain of custody protection, laboratory control, accuracy in testing, and quality assurance. These requirements will apply to random testing and, as of October 2, 1989, they will apply to reasonable cause testing under the previously existing FRA regulations. Thus, the FRA safeguards for specimen collection and testing which were part of the regulations recently upheld by the Supreme Court will be more precise and detailed under the Secretary's regulations.

This aspect of the DOT and FRA regulations highlights the necessity for a minor modification to S. 561. Beginning at line 17 on page 11 of S. 561 the Secretary of Transportation would be directed to "... incorporate the Department of Health and Human Services scientific and technical guidelines guidelines..." in DOT's drug and alcohol testing regulations. It is not necessary, and in some respects it would be inappropriate to incorporate, without modification, the HHS Guidelines into the DOT regulations. The HHS Guidelines, intended to apply to Federal agencies, contain reference to legal authorities which are not applicable. Additionally, the HHS Guidelines contemplate the physical and organizational circumstances of Federal agencies. For example Federal agencies are required to maintain a permanent log book at collection sites. This requirement

is difficult to transplant into the transportation environment with widely dispersed or remote locations, and thus DOT would substitute a "custody and control form" for the HHS "log book" for permanent record keeping purposes. Importantly, the essential procedural safeguards and the technical laboratory proficiency requirements have been adopted by DOT.

We recommend at line 17 on page 11 of S. 561 the words "adopt and modify where necessary" be added in lieu of the word "incorporate."

In an effort to implement random drug testing consistent with the Federal employee testing program and without delay, the Federal Railroad Administration did not include alcohol testing in the random program. (There are provisions for alcohol testing in the mandatory post accident tests and in the "reasonable cause" testing under the 1985 regulations). Testing for alcohol in the random testing program involves technical considerations which have not yet been resolved. For example, neither the HHS "Mandatory Guidelines for Federal Workplace Programs" nor the DOT "Procedures for Transportation Workplace Drug Testing Programs" contain collection procedures or technical laboratory testing requirements for alcohol testing. Thus, while we support the principal of random testing for alcohol and believe that an aggressive attack on both alcohol and drug abuse in the transportation industry is essential, we believe that DOT should be given greater discretion in

structuring a random program for alcohol testing. The results of FRA's mandatory post accident testing indicate a significant difference in the frequency of positive alcohol tests compared to positive drug tests. These test results indicate that alcohol use may be declining and the time may come when random testing for alcohol may not be justified. If that is the case, DOT should have the latitude to focus the random program solely on drugs.

As was the case with FRA's post-accident and reasonable cause testing regulations, the random testing regulations applicable to the railroad industry have been challenged by rail labor in the United States District Court of the Northern District of California. Petitioners have not sought a restraining order and no procedural schedule has been set by the court.

Congress has a significant opportunity to make a decisive difference in the outcome of pending or potential litigation. There should be a Congressional finding that public and rail employee safety must be protected by a random testing program in view of the demonstrated incidence of drug use by railroad operating employees. As reported by the FRA reasonable cause testing by railroads resulted in a 5.8 percent positive rate in 1986 for drugs and alcohol, with a 4.4 percent positive rate for drugs alone. These reasonable cause tests produced a 6.8 percent positive rate in 1987 for drugs and alcohol, with a 5.5 percent positive rate for drugs alone. While some, but not all, individual railroads report improvements since

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reasonable cause testing was first implemented, the later experience still portrays a problem which must be solved. FRA's post accident testing produced a 3.7 percent positive rate for unauthorized drug use in 1986, a 5.1 percent positive rate in 1987 and a 5.6 percent positive rate for 1988. For alcohol the positive rates were .9 percent in 1986 and .4 percent for both 1987 and 1988.

FRA's summary of 54 accidents occurring between January 1, 1987 and August 15, 1988 in which one or more employees tested positive for drugs revealed that those accidents resulted in 32 fatalities, 357 injuries and more than \$33 million dollars in railroad property damage alone. The Federal Railroad Administration recently observed that the railroad industry has "... attempted every major strategy conceivable to control alcohol and drug use, with the exception of random testing," and yet the risks have not been satisfactorily controlled. Based on the record outlined above and on a finding that unacceptable risks exist, Congress should direct that the Secretary implement a random testing program for the railroad industry as contemplated in S. 561.

There has been considerable debate on the matter of rehabilitation and on the railroads' discretion to discipline employees detected to have been under the influence of alcohol or to have used a controlled substance.

On the issue of rehabilitation it is important to note that railroads offer counseling and rehabilitation to employees through employee assistance programs and through a nationally negotiated health and welfare insurance program. Employees detected to have used drugs or alcohol in violation of Federal or company rules as well as employees that voluntarily seek assistance may obtain treatment both in the form of counseling and medical care.

Under existing Federal regulations railroads are required to offer an opportunity for rehabilitation to any employee who voluntarily seeks assistance. If the condition of the employee requires that he be removed from his position, he is to be reinstated upon satisfactory completion of the rehabilitation program.

We urge that the existing framework for rehabilitation programs not be disturbed.

Legislation introduced in the House would require that all railroads adopt a uniform policy guaranteeing each employee detected to have used drugs or alcohol in violation of Federal and/or company rules the right to reinstatement following successful treatment. We urge that Congress not impose a rule which guarantees all employees one free ticket to re-employment outside the voluntary referral program.

It is true that some railroads have negotiated so-called by-pass agreements with their employees under which first-time offenders may waive their rights to an investigation and agree to treatment and rehabilitation. They are suspended from service without pay, but with the assurance that they will be returned to service following successful completion of the treatment and counseling process. These railroads generally have agreed to give employees this privilege of returning to service in return for the agreement by employees to conduct peer education and co-worker referral programs such as "Operation Red Block." Congress should not create a disincentive to labor organizations' participation in the education and co-worker referral process on these railroads by legislating return to service as a matter of entitlement.

First-time offenders on other railroads without by-pass agreements also receive counseling and medical treatment where necessary, but do not have a guarantee that they will be reinstated. As a practical matter, employees who can demonstrate that they have been rehabilitated and can be expected to remain clean and sober are often rehired with seniority restored. Importantly, for railroads which consider job loss to be a necessary element in deterrence and which have not entered into by-pass agreements, there should not be a Federal law guaranteeing reinstatement following detection of drug or alcohol use in violation of Federal or company rules.

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Railroads have long had the freedom to take appropriate disciplinary action for violation of company operating rules and there appears to be no appropriate Federal interest in stripping the railroads of their right to take disciplinary action for violation of Rule G.

The AAR also supports S. 561 in that it applies to all modes of transportation. The risk to the public exists where there may be drug or alcohol abuse by transportation employees performing safety-sensitive functions in industries other than the railroad industry. For example, the reduction of the potential threat to public safety on the highways would produce significantly greater benefits because of the larger number of people exposed to danger resulting from drug and alcohol abuse on the nation's highways.

Indeed, random testing of truck drivers should produce far greater reductions in fatalities and accidents than would similar testing in the railroad industry, because trucks operate on public highways where accidents are more frequent. In addition to the fact that trucks operate in an environment where there are a significant number of people at risk, the target of a testing program, the truck drivers, are subject to ~~less~~ supervision than virtually any other worker in the transportation industry.

Furthermore, while the railroads continue to cooperate with the Federal Railroad Administration in pioneering the field of

Federally structured drug and alcohol testing on an industry basis, that effort is not without cost. As a matter of public policy and competitive equity, it is reasonable to subject all employers in the transportation industry to Federally mandated programs to eliminate drug and alcohol abuse as a threat to public safety.

In conclusion we support enactment of S. 561 and look forward to the opportunity to work with you and members of your staff on this important legislation in the weeks and months

The CHAIRMAN. I might inject a question right here because we have heard testimony with respect to rehabilitation in the railroads, Union Pacific in particular, and others which seemingly work very successfully.

Can you tell us, as the head of the American Railroad group, how that rehabilitation is working. Describe it for the committee. How extensive is it with the various roads and so forth?

Mr. BRIGGS. There are a number of roads that have programs which attempt to encourage voluntary referral and to utilize peer pressure to get people to volunteer for those programs. In most of the programs, the volunteers go through the rehabilitation period and are guaranteed re-employment. It has been successful.

One of the concerns that we have—and it came out earlier in your discussion with Congressman Luken, is that the House bill, which requires mandatory reinstatement, a guarantee of reinstatement when someone is found to have abused a substance or have alcohol abuse, creates a disincentive for the voluntary program. If you know that in fact you are going to get mandatory reinstatement, whether they catch you or you refer yourself, it dilutes that voluntary program. In truth and in practice, in most cases where you would find someone, if they went through the program successfully, they would probably get their job back; but there is a difference between probably and a guarantee.

More progress continues to be made as we have had more experience with it, but the voluntary programs have been successful.

The CHAIRMAN. Well, I can think of the mandatory reinstatement program as concerns the United States Senator and those in his employ. Can you not see a person coming back found drunk in the office easily rehabilitated? I do not see how they could cause any harm, do you, Jim? I mean it is bound to improve the legislation.

I have got to feel about how President Lincoln had with General Grant, you know. Help him along and maybe we can get more results up here.

But in any event, I can see right now even though I would want to keep them on, I would have to be thinking about my political hide, you know. Great gosh. Go to the voters and say yes, they have got that drunk still on the payroll up there. And they would not go along with mandatory reinstatement for their own office.

Mr. BRIGGS. Well, there are two factors. The first is if you have mandatory reinstatement, that random testing is going to be less of

a deterrent. The second thing is it also reduces the incentive for voluntary referral, because, in effect, you get your job back either way.

The CHAIRMAN. And it gives you a right you do not have at the present time.

Mr. BRIGGS. That is right.

The CHAIRMAN. Thank you very much.

Mr. Ward.

**STATEMENT OF WILLIAM R. WARD, CHAIRMAN OF THE BOARD,
AMERICAN TRUCKING ASSOCIATIONS, INC.; ACCOMPANIED BY
ROBERT FERRIS, VICE PRESIDENT OF POLICY**

Mr. WARD. Thank you, Mr. Chairman.

My name is William R. Ward, and I am the Chairman of the Board of American Trucking Associations, and with me today is our Vice President of Policy, Mr. Bob Ferris, if you have questions for him.

Although, Mr. Chairman, I will tell you, I am particularly pleased to be able to give our industry's testimony, because I am also the owner and president of a tank truck company, a small tank company, in Denver, Colorado, hauling hazardous materials. And I want the committee to know that I do feel strongly about this issue; and we feel like we need your help.

Drug users and alcoholics simply have no place in my company; and that is true for thousands of other trucking operators across the country that feel the same. We think that we are, and we think that the public is, entitled to know that their highways are drug-free and that the folks driving the big rigs are drug-free.

Having said that, let me tell you what our industry's policy is. We support the testing for drugs and alcohol on the following basis. We support pre-employment testing to identify drug users and alcoholics. We support periodic or biennial testing for drug users and alcoholism. And we support testing in the case of reasonable suspicion. We also support post-accident testing, again on the grounds of reasonable suspicion or whether there is a fatality involved. And then we support random roadside drug and alcohol testing by government officials as a part of—and this is the significant part of the change—to be as a part of a Federal program that would put all truck drivers at equal risk for testing. And we believe that should also include industry testing as well.

You will recognize, Mr. Chairman, that is a considerable strengthening of our industry's previous stance. We believe the problem needs to be addressed by carriers and shippers, and government and roadside testing all playing a part in developing a system where every truck driver in the country has an equal risk of being caught.

Now, Mr. Chairman, I also want to reaffirm our industry's support for a pilot roadside testing program. We still believe, in the instance of random testing, that that kind of program would be the ideal program to institute random testing and to capture, across the board, the widest sample on a random basis.

Having taken that positive stance—and we are positive, Mr. Chairman—I just also would wish to add this: that our industry's

support for this is clear. We believe it needs to be done. But we would also, I guess, ask, sir, that we would trust that we not have to create an enormous bureaucracy in order to accomplish this worthwhile goal. And our industry believes that it can be done without creating undue burden.

And then I would also say to you, sir, since it has been a part of the discussion this morning and your questions about mandatory rehabilitation and mandatory rehiring, if I might, I just would personalize our industry's view. We are opposed to both of those. And I will personalize that by simply saying that I would not like for you to tell me as a tank truck operator hauling gasoline that I have to put a driver who we have identified as a drug user back on the highway and back in the cab of that truck on the hope that he is rehabilitated.

But the bottom line is we support drug testing in the trucking industry, including random testing; and we look forward to working with you to accomplish that.

[The statement follows:]

STATEMENT OF WILLIAM R. WARD, CHAIRMAN OF THE BOARD, AMERICAN TRUCKING ASSNS.

I am William R. Ward Chairman of the Board of the American Trucking Associations (ATA). I welcome the opportunity to discuss the concerns we in the trucking industry share with this committee about the pervasiveness of substance abuse and what we must do to deal with it.

These comments are submitted on behalf of ATA, the national trade association of the trucking industry. Through its 51 affiliated trucking associations located in every state and the District of Columbia, 10 affiliated conferences, and several thousand individual motor carriers, ATA represents every type and class of motor carrier in the country: for-hire and private; regulated and exempt.

The trucking industry is composed of more than 260,000 American firms, and accounts for 77 percent of all freight transportation revenues in this country. The industry employs 7.4 million Americans and generates annual revenues in excess of \$225 billion dollars.

The trucking industry shares the concern of the American public and Congress over the problem of substance abuse in our society. Drugs and alcohol have no place in the transportation industry and substance abusers must not be allowed to pilot our planes, steer our ships, or control our commercial vehicles on the highway.

We believe the vast majority of persons employed in the transportation industry are professionals. They are not substance abusers. However, we realize that if substance abuse is a problem in society, generally, it must be a problem in transportation and so we support strong efforts to eradicate drug and alcohol use from the various modes of transportation. We support programs which are designed to detect these violators as long as the programs are equally administered, provide adequate safeguards to protect the constitutional rights of all who are tested, and are cost effective.

In supporting alcohol and controlled substances testing ATA favors provisions which will provide for:

- o pre-employment testing to identify drug users;
- o periodic or biennial testing, as part of the biennial physical examination;

- o reasonable suspicion testing;
- o post-accident testing, based on reasonable suspicion and conducted by enforcement agencies;
- o random drug and alcohol testing at the option of motor carriers and a pilot project by DOT to determine if random testing is practical and effective;
- o procedures which insure proper collection, testing, and laboratory standards;
- o tough penalties for drivers who violate drug and alcohol regulations; and
- o application of the regulations to intrastate as well as interstate drivers.

ATA believes that Federal legislation should authorize and encourage motor carriers to provide employee rehabilitation programs. However, Federal legislation should not require motor carriers to pay for the cost of rehabilitation.

Current Trucking Industry Drug Efforts

The trucking industry has been at the forefront of efforts to control substance abuse within its ranks. ATA has developed a drug awareness program which is used by motor carriers to make drivers and supervisors aware of the hazards of alcohol and drug use and how to detect abuse among employees. This program is also utilized to inform drivers and others of laws and regulations that prohibit use of drugs and alcohol. ATA and its affiliates have conducted seminars throughout the nation to teach managers and supervisors how to conduct effective drug control programs.

Within the next 60 days, ATA will also be initiating a formal agreement with a major national drug testing laboratory to provide assistance to motor carriers in complying with the drug testing regulations recently adopted by the Department of Transportation (DOT). These regulations are scheduled to take effect in December of this year for carriers with more than fifty drivers and in December of 1990 for carriers with less than fifty drivers.

In the last three years, many motor carriers have established drug testing programs unilaterally, or as part of collective bargaining agreements. These programs, focusing on pre-employment, periodic and "reasonable suspicion" testing are working well in the view of the carriers who have concluded their own arrangements for drug testing.

While progress is being made, the trucking industry continues to need strong support from the Federal government for effective control of drug and alcohol abuse. Although the role of drugs as a causative factor in truck accidents remains unquantified and the extent of drug abuse by drivers remains unknown, anecdotal information suggests the need for more enforcement through the Motor Carrier Safety Assistance Program (MCSAP). As we shall discuss later in our comments, this program needs additional support from Congress for increased manpower and funding to meet expanded needs in support of substance abuse detection programs.

We are especially supportive of the provisions of this bill which make drug testing applicable to drivers in intrastate as well as interstate commerce. There is a need to provide uniform protection for all users of our highway system.

The following ATA comments are set forth in an effort to assist this Committee in drafting meaningful legislation which will help to reduce the menace of drug and alcohol abuse in the motor carrier industry in a fair and consistent manner.

MOTOR CARRIER REQUIREMENTS OF S.561

This bill will amend The Commercial Motor Vehicle Safety Act of 1986 by adding a new section entitled "ALCOHOL AND CONTROLLED SUBSTANCES TESTING". It will require the Secretary of Transportation within twelve months after the date of enactment to establish a program which requires motor carriers to conduct preemployment, periodic recurring, random and post-accident testing of the operators of commercial motor vehicles. It will also require testing upon a reasonable suspicion that drivers have used, without lawful authorization, alcohol or a controlled substance.

The bill also specifies that the Secretary must promulgate regulations setting forth requirements for:

- o testing procedures;
- o penalty for violations;
- o state or local government preemption;
- o pilot test program; and
- o employee rehabilitation.

With the exception of the requirement for a pilot test program, most of the requirements in this bill concerning controlled substances have been addressed by DOT in prior rule-makings and now stand adopted as published rules in Part 391 Subpart H of the Federal Motor Carrier Safety Regulations and in Part 40.

However, the current DOT regulations limit controlled substances testing to interstate commercial drivers and do not apply to truck drivers in intrastate operations which "affect" interstate commerce. We strongly support applying the rules to these drivers as well. While this is implied in the language of the bill we hope that the Committee will give DOT explicit directions to include these drivers.

U.S. DOT's regulations also specify that the DOT sample will be used to test for only five types of drugs. This actually results in less information for the motor carrier than the motor carrier now obtains under current voluntary programs where

results are reported in eight drug types. While DOT does not prohibit a motor carrier from collecting a second sample and testing it, several states do limit this kind of testing. We urge the committee to direct DOT to allow motor carriers to test for additional drugs using the DOT sample.

ATA opposes the use of alcohol by drivers either while on duty or when it would impair their ability to drive. However, the use of alcohol while the driver is off duty is not unlawful and it may not always be appropriate to test for alcohol every time a drug test is performed.

We will discuss ATA's position on each of the provisions of the bill and, where appropriate, make recommendations or suggest improvements that will increase the effectiveness of alcohol and controlled substances testing.

CONTROLLED SUBSTANCE TESTING

Pre-employment testing

ATA supports mandatory drug testing through analysis of a urine specimen of truck drivers (company drivers, owner operators, or independents) before they are hired to drive. Mandatory pre-employment testing is essential to reduce the possibility that a motor carrier will hire a drug user. To be

qualified, an applicant must consent to be tested and must test negative for controlled substances. We do not feel that it would be necessary to perform a pre-employment test for alcohol. The results of such a test would not indicate that the driver has performed any unlawful use of alcohol since the applicant was not yet driving a commercial motor vehicle for the employer.

Periodic or biennial testing

As adopted by DOT, periodic (biennial) testing requires a motor carrier to test a driver for drugs during the first medical examination of the driver after the implementation of the drug testing program. A motor carrier will then be able to discontinue periodic testing after the first calendar year of its random drug testing program.

In its comments to the DOT drug testing rulemaking, ATA supported the position that Federal regulations should require periodic testing by motor carriers in conjunction with the biennial physical examination. We believe that periodic testing serves as a continuing deterrent for those who do not use drugs and as a continuing means of detecting drug use by casual users as well as by those who are dependent upon drugs. A laboratory which performs drug screens for several major carriers indicated that it has found from 13-18% of drug screens done for

reexaminations to be positive. This has occurred even where carriers have given 30-60 days notice that drug screens will be done. Biennial testing is an effective deterrent.

ATA believes that periodic drug testing can be a viable part of the drug testing program. A motor carrier should have the option of scheduling the test prior to the end of a 24 month period. Without advance notice, the periodic test will be effective in providing detection of drug use by those who are casual users as well as by those who are dependent on drugs.

However, under the current rules, if the doctor sees signs of alcoholism, the doctor should expand his examination to determine whether the applicant has a clinical diagnosis of alcoholism. If he does, FHWA's rules require that the driver be found not qualified to drive.

Reasonable suspicion testing

ATA supports the requirement that motor carriers shall require a driver to be tested, upon reasonable suspicion, for the use of controlled substances and alcohol. ATA recognizes testing on the basis of reasonable suspicion as a strong deterrent to drug and alcohol use by drivers prior to going on duty or while on duty. Information from motor carriers indicates that reasonable suspicion is an effective aspect of a drug and alcohol

abatement program. The benefits of the program are the ability to assure that a driver is in fit condition prior to getting behind the wheel of an 80,000 lb. vehicle. The public benefits, the company benefits, and the driver benefits, if drug and alcohol usage is detected through testing on the basis of reasonable suspicion and an accident is avoided. Given the deterrent value and benefits to the public, testing on the basis of reasonable suspicion must be an integral part of a drug and alcohol testing program.

Post-accident testing

Current DOT regulations require a truck driver to provide a urine specimen to be tested for the use of controlled substances as soon as possible after a reportable accident regardless of whether substance abuse is suspected. The driver must also ensure that the specimen is forwarded and processed by a laboratory which conforms with Federal guidelines. ATA does not support this approach.

ATA supports post-accident testing for all drivers of all vehicles provided that it is based on reasonable suspicion that the driver has used drugs or alcohol. Post-accident testing should be directed and arranged by law enforcement agencies, not motor carriers or drivers. The situation for drug testing is

analogous to the current practice of law enforcement officials who have a driver tested for alcohol use following an accident, if the officer on the scene has a reasonable suspicion that the driver is under the influence.

The bill requires DOT to make motor carriers responsible for post-accident testing. It is not practical to impose a post accident testing requirement on motor carriers because a majority are very small and for the following reasons are not capable of fulfilling such requirements:

- o Carrier management is often hundreds of miles from the scene and cannot deal with the situation practically;
- o Frequently the motor carrier is not aware of a fatality that does not occur immediately at the time of a collision;
- o Once the driver is cleared to leave the accident scene it is often difficult for a motor carrier to make contact with the driver again within a 12-hour period of time; and
- o In a one truck operation, the driver/owner will not voluntarily go for a drug test if he believes he will test positive. In a two or three truck operation the motor carrier owner often cannot be reached after an accident because he or she, too, is a driver and may be off on a trip.

If there is reasonable suspicion of alcohol or drug use following an accident, we believe that testing should be done as soon as possible. It should be the responsibility of the police officer, not the motor carrier, to require that the driver go to a collection site and provide a specimen.

Random drug and alcohol testing

Proponents of random testing state that such testing is the most effective method of deterring alcohol and drug use in the work place, as long as the selection procedure is truly random. There are two basic roadblocks to development of an effective random testing program where motor carriers are mandated to do the testing:

1. Seventy one percent of the motor carriers have only one vehicle, and most of the others have less than six vehicles. It is not practical for an owner-operator to test himself/herself randomly.
2. Most drivers operate approximately 100,000 miles a year. They are away from home most of the time driving, loading and unloading, and waiting for loads. They are not readily available for random drug testing.

In its Notice of Proposed Rulemaking on drug testing, the Federal Highway Administration (FHWA) said "Random selection ensures that every member of a given population will have an

equal chance of being tested." Because small entities cannot test themselves randomly, there is little hope of imposing a random drug testing requirement on motor carriers that assures every driver has an equal chance of being tested.

FHWA has proposed using voluntary consortiums to create drug testing pools for owner-operators and other smaller employers. However, we are concerned that FHWA does not license, certify, or regulate these consortiums. A motor carrier will have no practical way of assuring that the consortium is a legitimate operation. It is precisely the drivers with the worst problems who will seek out the least effective consortiums. One bad consortium can destroy the system.

In supporting the concept for random alcohol and drug testing, the successful random testing program of the U.S. Coast Guard is cited for the dramatic reduction in drug use it has produced. However, the trucking industry is not like the Coast Guard, nor can it be fairly compared to the airline or railroad industry. The potential for an effective random testing program in the motor carrier industry is not comparable because it is so vastly different. The Coast Guard has immediate command of its officers and enlisted men and women almost twenty four hours a day. An order is given for a drug test and it is quickly carried out.

The key to success of Coast Guard and other random drug testing programs is that the employees are readily available for testing if their number comes up. In the trucking industry, employees are not readily available. The only way to reach every driver equally and quickly is through roadside random drug testing. Truck drivers spend most of their time on the road and an effective random drug testing program logically must be at roadside locations.

Roadside testing, conducted by state enforcement officers participating in the Motor Carrier Safety Assistance Program (MCSAP), overcomes the trucking industry problems of carrier size, driver availability and fraudulent consortiums. It overcomes the potential of management failure to have a random testing program and the potential for driver failure to obey an order to be tested in a timely fashion after being notified that he/she has been selected for random testing. A roadside program would create the credible threat that any driver, at any time, might be tested.

PROCEDURES FOR TESTING

ATA generally agrees with the requirement to use guidelines of the U.S. Department of Health and Human Services (HHS) which cover sample collection standards, standards for testing, and

laboratory standards. These same guidelines were adopted by DOT as the standards by which all testing would be conducted in its required controlled substance testing regulations.

Since adoption of these regulations, the Secretary of the U.S. Department of Transportation has asked for and received comments on "Procedures For Transportation Workplace Drug Testing Programs" to improve the viability of the program for the motor carrier industry and for other modes of transportation. ATA made specific recommendations for improvements in a number of areas including:

1. Insure the availability of sufficient certified laboratories to avoid bottlenecks in the program and to minimize the potential for price-gouging. At this point, there are only 20 laboratories for testing over 4 million employees and covered Federal employees.
2. Relieve the transportation industry of responsibility for quality control assessments of drug-testing facilities, since other mechanisms exist.
3. Provide for direct communication of negative test results to motor carriers, without going through the medical review officer.
4. Provide for transmittal of full results of positive tests, including quantification, to expedite the final determination by the Medical Review Officer as to whether or not an individual is qualified as a driver.

5. Provide for telephonic communication of information on "positive" test results with suitable safeguards to insure that information is transmitted only between those authorized to possess it. This will allow us to act faster to get drug users off the road.
6. Authorize motor carriers to request a semi-quantitative analysis of the DOT specimen to determine the presence of additional controlled substances.

ATA will provide committee staff with the complete text of its comments concerning improved procedures for workplace drug testing programs.

PENALTIES

The penalties for drivers whose drug tests show positive should be tough. Current DOT regulations for commercial motor vehicle operators provide for a one year disqualification for the following offenses:

1. Driving a commercial motor vehicle while the person's alcohol concentration is 0.04 percent or more;
2. Driving under the influence of alcohol, as prescribed by State law;
3. Refusal to undergo such testing as is required by any State or jurisdiction in the enforcement of driver disqualification regulations; or
4. Driving a motor vehicle under the influence of a Schedule I drug or other substance identified in the appendix to the regulations, an amphetamine, a narcotic drug, a formulation of an amphetamine or a derivative of a narcotic drug.

Subsequent offenses of any of the above violations result in permanent driver disqualification. We support these penalties.

STATE AND LOCAL GOVERNMENT PREEMPTION

ATA supports the provisions of this bill which prevent any state or local government from adopting or putting into effect any law, rule, regulation, ordinance, standard, or order that is inconsistent with the regulations that are promulgated under this section. It is important that the legislation preempt state and local laws that are an obstacle to meeting the Federal requirements, as well as those that are in direct conflict with them. We ask that this be reflected in the legislative history.

In our comments to DOT on the proposed rules for controlled substance testing ATA pointed out that the demands of interstate commerce require that drug testing programs of companies operating in interstate commerce be uniform. We believe that there would be a serious impact on highway safety and a burden on interstate commerce if a company cannot give drug tests to drivers in interstate commerce merely because they are based in a state that limits testing.

PILOT DRUG TESTING PROGRAM

ATA fully supports a pilot project of random roadside testing of operators of commercial motor vehicles by Federal or state governments to determine whether an operator has used, without lawful authorization, alcohol or a controlled substance.

This provision of the bill tracks in close fashion established ATA policy with regard to random drug testing. We believe that a program of testing in at least four states geographically and statistically selected, will provide accurate data for the DOT to assess the effectiveness of random drug testing.

It is our understanding that FHWA is in the process of contracting with an outside firm to develop a similar pilot random drug testing program. We support the committee's efforts to establish a framework for the study.

EMPLOYEE REHABILITATION

Employee assistance and rehabilitation is a desirable goal but it should not detract from the basic objective of assuring that drivers with drug problems do not jeopardize the safety and welfare of the public by operating commercial motor vehicles on the nation's highways.

Many motor carriers, at present, provide unpaid leave and job security on a one-time basis for persons who voluntarily acknowledge a substance abuse problem and seek assistance to deal with it. We believe that Federal legislation should authorize and encourage motor carriers to provide employee rehabilitation programs. However, Federal legislation should not require motor carriers to pay for the cost of rehabilitation.

Motor carriers do not support any requirement which would mandate payment of the rehabilitation cost by a motor carrier. Such payments should come from health and welfare funds, from medical insurance and from the employee, but not from the employer. The cost of rehabilitation ranges from \$8,000 to \$13,000 for one month of in-patient care. In simple terms, motor carriers cannot afford rehabilitation costs especially where Federal laws and regulations flatly prohibit the use of drivers who use alcohol or drugs or are convicted of operating under the influence of alcohol and/or drugs.

Summary and Conclusions

The trucking industry is cognizant of the dangers that are created by operators of commercial motor vehicles who drive after using drugs and alcohol. There must be tough penalties for those who are caught operating a commercial motor vehicle while using

drugs or alcohol. We support a program which is designed to detect these violators if it is equally administered, cost effective, and provides adequate safeguards to protect the constitutional rights of all who are tested.

We believe this bill could correct some of the deficiencies which currently exist in the DOT drug testing regulations, especially where drug testing would apply to intrastate as well as interstate drivers. Both types of drivers operate many of the same types of vehicles over the same roads. The safety of the motoring public is in no less jeopardy because a commercial driver who is under the influence of drugs is operating in intrastate as opposed to interstate, commerce.

ATA appreciates the opportunity to provide input to the committee on the issue of alcohol and controlled substance testing. We look forward to providing any assistance the Committee or its staff feels may be appropriate on this topic in the future.

The CHAIRMAN. You would have to do it in a very careful fashion, if done at all, as your testimony indicates, Mr. Ward. I do not know how you would get insurance to cover you, if you are going to put them back on. I do not know what your rate would be.

What is the extent of drug and alcohol usage in the trucking industry? We saw one test by an insurance group that said a third of 300 tested in a sample. Would it be that much, 30 percent, or a third of that—10 percent?

I am just trying to get a feel from you. You are the first authority we have had up here in a while that would know the extent of alcohol or drug usage in America's trucking industry.

Mr. WARD. I guess the honest answer is none of us know. I will tell you it is my personal belief, again based upon my experience operating a truck line, I do not think the problem is very large in our industry. I certainly do not think it is very large in my company. But I guess the balance that I weigh, at least in my operation, is that I want it to be zero, too. I do not want any drivers that have a drug problem on our trucks. But I do not think it is a very large problem in our industry.

The CHAIRMAN. Not any more than the average public is what you are saying?

Mr. WARD. Yes. And maybe less.

The CHAIRMAN. Their livelihoods depend upon being safe drivers, in order to keep their jobs.

Mr. WARD. I think it is another reason why, at least in my judgment, a reasonable amount of random testing will accomplish a great deal. I think that will act as a major deterrent. And I think the 50 percent requirement that DOT is proposing is far excessive over what is needed to effectively accomplish random testing.

The CHAIRMAN. You see, if it works, or we extend, as indicated, to all truckers, then logically all truckers will say, well, why not all automobile drivers? Can you not see us on that one, random testing for all motor vehicle operators in America?

So what you are doing is making a differentiation on the basis of the highest degree of care for those in public transportation. You have the highest degree of care, where under the law, of course, as a regular driver on the highway, I owe the regular degree of care as a reasonable, sane and prudent individual.

I do not think we are going overboard, and I think it is necessary. I do not think the American public really understands the extensive nature of this particular hazard. And I do not know really how to get a grip on it. But as we move in every direction, in the military and otherwise, now in public transportation, which I hope we will this year, I think it will bring about an awareness in regular driving, in addition to the states which are strengthening their driving under the influence statutes.

Jim, do you want to ask any questions?

Senator EXON. I will withhold until we finish the testimony.

The CHAIRMAN. Very good.

Mr. Bergoffen.

STATEMENT OF GENE BERGOFFEN, EXECUTIVE VICE-PRESIDENT, NATIONAL PRIVATE TRUCK COUNCIL

Mr. BERGOFFEN. Thank you, Mr. Chairman, Senator Exon.

I am grateful for this opportunity to represent the Nation's private motor carrier community, supporting this vital legislation.

The National Private Truck Council believes strongly that the problem of truck driver use of drugs and alcohol is real, and it is significant. We must act now and act aggressively. Laws which punish after the act are not enough. Unless there are laws that deter the use of drugs and alcohol, we have not really attacked the problem. S. 561 would do that through its mandatory requirements, especially random testing. Not only will this approach save lives. Ultimately, it is good business.

Since the DOT regulations were first published, NPTC has supported mandatory drug testing, including random testing. Fundamentally, we believe a driver that is drug-free has nothing to fear.

In your materials you will see a brochure which highlights our commitment to drug and alcohol-free operation of trucks. Next week in Chicago we begin the first of a series of seminars and programs to help the trucking community prepare for effective and sensitive testing programs.

We have some suggestions to improve the bill, but we do pledge our wholehearted support of S. 561. The main advantage of the bill

is that it mandates drug and alcohol testing by statute and removes the discretion that DOT now has to withdraw the drug testing rules. It backs the good moves DOT has made to begin the drug testing effort. And the second major advantage is that it adds alcohol testing to current requirements.

My written statement focuses on changes we feel are needed to smooth the implementation of the requirements. I will not highlight those, but I will specify one, that we agree with the bill's approach of not requiring mandatory rehabilitation, and support its intent to require DOT regulations to govern only those programs carriers choose voluntarily to implement.

Finally, Mr. Chairman, we believe S. 561 strikes an appropriate balance between privacy rights of individual workers and public rights to travel safely. We urge the legislation be enacted and offer our help to make that possible.

Thank you.

[The statement follows:]

STATEMENT OF GENE S. BERGOFFEN, EXECUTIVE VICE PRESIDENT, NATIONAL PRIVATE TRUCK
COUNCIL

Mr. Chairman and Members of the Committee:

I am Gene Bergoffen, Executive Vice President of the National Private Truck Council (NPTC), the national organization representing companies which operate truck fleets as an extension of their manufacturing, retailing, or other primary business.

Summary of Positions

We are pleased to appear here today to express our members' unqualified support for drug and alcohol testing of drivers of commercial motor vehicles. Accordingly, we strongly support S. 561, the proposed drug and alcohol testing legislation which you, Mr. Chairman, Senator Danforth, and many other Senators have introduced.

As I explained during hearings on motor carrier safety chaired by Senator Exon on April 19, NPTC's support for S. 561 specifically includes support for random testing. We believe that random testing is an important component of an overall drug and alcohol testing program.

The balance of my testimony today consists of three parts: first, a brief description of the NPTC and private carriage; second, a summary of the reasons why we strongly support mandatory testing to detect drug and alcohol use by commercial motor vehicle drivers; and third, our comments on several specific provisions of S. 561.

The NPTC

NPTC was formed in the Fall of 1988 as a result of the merger of two long established but smaller organizations representing private carriers.

Collectively, private carriers represent the most significant segment of truck operators, and no survey of motor carriers of freight can be considered complete without taking private carriers into account. In 1986, for example, private carriers operated two-thirds of the 1.02 million trucks in this country weighing over 26,000 pounds gross vehicle weight.

Our new and growing association of nearly 3000 members is fully representative of this extremely important group of truck operators. NPTC represents fleets operated by Fortune 500 companies as well as those operated by regional and local businesses.

Our members operate virtually every type of commercial motor vehicle, including tank trucks, 48 and 53 foot long semitrailers, 28 foot twin-trailer combinations, and straight trucks used in local delivery operations of enterprises such as bakeries and dairies.

NPTC members' operations are similarly diverse. Some own their trucks and employ unionized drivers. Some lease both their trucks and drivers. Some do a combination of these things. Some operate solely as private carriers. Many also conduct some for-hire operations.

This diversity in the operations and composition of our membership is also reflected in the makeup of our Board of Directors. For the Committee's information, I have attached our Board membership to this testimony.

Mandatory Drug and Alcohol Testing of Commercial Motor Vehicle Drivers
Is Warranted

The abuse of drugs and alcohol in our country has reached epidemic proportions. Indeed, hardly a day goes by that we aren't confronted by a television or newspaper report of a death or injury that resulted from the abuse of illegal drugs or alcohol.

Of immediate importance to NPTC's members are the well known, injurious consequences of drug and alcohol abuse on the highways. As the findings expressed in S. 561 correctly recognize, "the use of alcohol and illegal drugs has been demonstrated to affect significantly the performance of individuals, and has been proven to have been a critical factor in transportation accidents."

We will not attempt today to recite all the evidence, or even all of the evidence we are aware of, which demonstrates that drug and alcohol abuse by commercial motor vehicle drivers has a serious adverse affect on safety and productivity. We believe that this Committee fairly described that evidence in its report on S. 561's predecessor in the last Congress (S. Rep. No. 100-43, to accompany S. 1041). However, let me briefly describe some of the facts which have led our members to take a firm

position favoring the testing of drivers for drug and alcohol use.

As long ago as 1982, an Industry Week study found that drug impaired workers are 3.6 times more likely to be involved in accidents. That study also found that drug impaired workers have 2.5 times as many absences lasting eight days or more, are five times more likely to file workers' compensation claims, have three times the average level of sick benefits, and function at only 67 percent of their work potential.

A 1986 study by the Insurance Institute for Highway Safety (IIHS), involving random drug tests of 316 truck drivers at weigh stations in Tennessee, similarly demonstrated that the problem of drug and alcohol use by commercial motor vehicle drivers is widespread and requires corrective action. As reported by DOT, the results of those tests disclosed that 29 percent tested positive for drugs "with the potential for abuse"; fifteen percent tested positive for marijuana metabolites; two percent tested positive for cocaine; five percent for amphetamines and other prescription stimulants; twelve percent for over-the-counter diet and cold pills; and one percent for alcohol. 53 Fed. Reg. 22268, 22270 (June 14, 1988). And, as disturbing as these results are, we find them even more disturbing because the drivers who participated in that study did so voluntarily; other drivers who were approached to participate in the study refused to do so.

We believe that the problem of drug and alcohol use by commercial motor vehicle drivers continues to exist. Thus, we need to take action, to be aggressive, in the interests of public safety and greater

productivity.

NPTC Supports Mandatory Drug and Alcohol Testing for Drivers

The time for action is now. Having laws on the books which punish drug and alcohol users after-the-fact, after innocent people are injured or killed, has proven to be inadequate to address the continuing scourge of drug and alcohol abuse on our highways.

Indeed, it is sad that, in spite of a direct causal connection between highway accidents and the use of illegal drugs and/or alcohol, so many of the deaths and injuries that we hear about still involve a truck or automobile whose driver was later found to have been operating under the influence of an illegal drug or alcohol. One can only wonder how many injuries could have been avoided, or lives -- that of the driver and of an innocent third party -- could have been saved if that driver's drug or alcohol abuse could have been detected beforehand.

While saving lives is the paramount reason our members support drug and alcohol testing for drivers of commercial motor vehicles, such testing is also important as a means of making our transportation system more productive and efficient. Because we believe that testing will greatly reduce drug and alcohol use by drivers, industry will benefit from a safer and more productive workplace, including reductions in driver absenteeism, medical and insurance costs, and pilferage.

To achieve both the safety and economic benefits, the members of

NPTC are committed to the goal of drug and alcohol-free operation of trucks. They believe that mandatory testing of drivers for drug and alcohol abuse is crucial to the achievement of that objective. NPTC's official policy supports mandatory testing of drivers for both drugs and alcohol conducted: prior to employment; in conjunction with a driver's biennial DOT physical; for "reasonable cause"; following the occurrence of a DOT-reportable accident; and randomly.

NPTC's members have also been staunch advocates for the Department of Transportation's regulations mandating the drug testing of commercial motor vehicle drivers, including random testing. While, as we explain later, we have some concerns for specific details of those rules, DOT is to be commended for its commitment to a drug-free motor carrier industry.

Speaking of DOT's regulations, I am particularly pleased to inform the Committee that next week NPTC is conducting a comprehensive seminar on drug testing (June 21-22, in Chicago). As part of our commitment to a drug-free industry, NPTC's seminar will assist companies in implementing an effective and productive drug testing program which meets DOT requirements. The seminar will also identify for companies the various administrative and legal issues they need to address properly in the course of implementing their drug testing program. For the Committee's information we have attached a copy of our seminar program to the testimony.

While our members endorse mandatory drug and alcohol testing, they are also sensitive to the privacy rights of the individual worker. Thus,

they recognize that the laws and regulations mandating such testing need to strike an appropriate balance between our rights to travel the highways safely and be free from the indiscriminate consequences of persons who so thoughtlessly abuse their privilege of driving, and the right to be protected against the invasion of our privacy. However, we believe that S. 561 achieves that balance.

S. 561

Mr. Chairman, we commend you, Senator Danforth and the many other cosponsors of S. 561 for introducing legislation that would establish a firm, clear, comprehensive and effective national policy for drug and alcohol testing of drivers to address the safety needs of the public, while also ensuring that the privacy rights of individuals remain protected. Although we may have some suggestions to improve this proposal, we pledge to support this very important legislative initiative.

Provisions Supported

In general, NPTC supports subsection (d)(1) of S. 561, which proposes to add Section 12020 to the Commercial Motor Vehicle Safety Act of 1986, which would require drug and alcohol testing of commercial drivers. I will begin by noting those provisions of proposed Section 12020 which NPTC particularly supports.

Subsection (a), Regulations. NPTC supports this provision,

which directs DOT to establish a regulatory drug and alcohol testing program requiring motor carriers to conduct preemployment, periodic, random and post-accident tests and testing when there is reasonable cause. As previously noted, the official policy of NPTC endorses mandatory testing for drivers in such instances.

One major benefit of S. 561 is that it will extend testing to alcohol for the first time; DOT's current rule pertains only to drugs.

NPTC also believes that, due to the controversial nature of such testing, it is better to mandate drug and alcohol testing expressly by statute rather than leave the determination of whether such regulations should be issued, and their scope, to regulatory agencies under their general authority. As long as a statute such as S. 561 is in place DOT will not have the discretion to withdraw its drug testing rule. This subsection will give permanency to a drug and alcohol testing program that would not otherwise be there in its absence.

Subsection (d), Procedures For Testing. For similar reasons, NPTC supports the testing procedures mandated by subsection (d). Constitutional and other legal imperatives demand that drug and alcohol tests be conducted in accordance with strict procedures, and that the privacy rights of drivers be fully protected. Thus it is important that DOT's implementing regulations be thorough and comprehensive, and that they establish precise and well-defined testing protocols. Although DOT has accomplished this with respect to its regulations governing testing for drugs, the statutory directives provided by subsection (d) will

nonetheless ensure that such objectives will remain fulfilled.

The requirements of subsection (d) will be similarly instructive when DOT establishes a protocol for alcohol testing.

Subsection (e), Effect on Other Laws and Regulations. NPTC strongly supports this provision, which would preclude states and local governments from adopting or putting into effect any requirement, other than a criminal law imposing sanctions, that would be inconsistent with the testing regulations established by DOT. It is important that the testing programs mandated by S. 561 be administered as uniformly as possible, no matter where a driver may reside, which company he or she works for, or where a test is administered. Confusion, and thus mistakes, will abound, if carriers have more than one set of testing requirements to comply with. The myriad issues presented by the federal testing requirements are complex and difficult enough to deal with without carriers and drivers having to confront as many as fifty state schemes and countless local requirements.

Other Provisions

As explained below, NPTC does not object to the other provisions of S. 561. Rather, NPTC has concerns with respect to how DOT has already or might in the future implement S. 561.

Subsection (b), Post-Accident Testing. As we previously stated, NPTC supports a requirement for mandatory testing of drivers

following DOT reportable accidents. Thus, NPTC supports this provision. However, NPTC has some practical concerns about how this should be done. We would prefer some changes in the manner in which DOT has addressed post-accident testing in its current rule. Accordingly, we want to describe our concerns in hope that the Committee will agree and include language in the bill or the accompanying report which will help make the requirements of post-accident testing more practical than under the DOT rule.

Of concern are the particular responsibilities DOT has imposed on drivers under its post-accident rule. Specifically, under the final rule, the driver has the responsibility to ensure that a urine sample is taken, that a drug test is performed in accordance with the testing procedures of 49 C.F.R. Part 40, and that the results are reported to the motor carrier following all reportable accidents involving that driver, based upon DOT's belief "that the driver is in the best possible position to ensure that a drug test is performed." 53 Fed. Reg. 47134, 47140 (November 21, 1988).

We believe the more practical way to impose a post-accident testing requirement is to place the responsibility for determining when a test is necessary, and for ensuring that tests are properly conducted, upon state or local law enforcement personnel on the accident scene, rather than on the driver or his or her carrier. Law enforcement officers are in a position to determine whether testing is needed in the given circumstances (and also to ensure that the drug test is administered properly and in timely order, either by administering the test personally

or by escorting the driver to the closest collection site, e.g., hospital, doctor's office, etc.). For example, a policeman on the scene of an accident involving a truck and an automobile that ran a red light may decide to waive a test for a commercial driver once that policeman determines that the truck driver was entirely without fault. On the other hand, the same policeman might conclude that a test of the driver of the car that ran the red light is warranted; under the current DOT rule, however, only the truck driver would have to be tested.

Subsection (c), Program for Rehabilitation. NPTC does not support mandatory rehabilitation. Although we recognize that drug and alcohol rehabilitation programs can be successful, we believe that the decision of whether rehabilitation should be offered is a matter which should be left to the discretion of each company, especially in the case of commercial motor vehicle drivers. The members of NPTC are not anxious to put drivers found to have used drugs or alcohol back behind the wheel of their commercial motor vehicles.

For companies which voluntarily do offer rehabilitation, however, NPTC members feel strongly that a driver should not be permitted to return to driving unless that driver meets certain minimum rehabilitation requirements. We understand that this is what subsection (c) intends, by requiring DOT to promulgate rules "setting forth requirements for a rehabilitation program for the identification of and opportunity for treatment of operators of commercial motor vehicles who are determined to have used, without lawful authorization, alcohol or a controlled substance. . . [and to] determine the circumstances under which such

operators shall be required to participate in such program."

We interpret subsection (c) to mean that, if a company is voluntarily providing rehabilitation to its drivers, before one of its drivers could return to driving the driver would have to undergo rehabilitation in accordance with the minimum requirements for rehabilitation established by DOT. Thus, for example, if DOT were to require a minimum of six months rehabilitation consisting of no less than seven hours of consultation with psychologists per week, that driver could not return to the road unless he or she completed that minimum rehabilitation and was certified by the attending psychologists to have been successfully rehabilitated.

In NPTC's opinion, the language of subsection (c) could be made much clearer. We understand that it is not intended to mandate rehabilitation but are concerned that it could be misconstrued to mandate it.

NPTC would also oppose granting DOT authority requiring companies to provide mandatory rehabilitation. NPTC believes the language of S. 561 should make clear that DOT does not have the authority to mandate company-provided rehabilitation, but only to establish minimum rehabilitation standards which drivers must meet in order to be qualified to operate a commercial motor vehicle again.

Subsection (d)(2)(B), Specifying the Drugs for Which Individuals May be Tested. As part of the direction DOT has been given for the development of testing procedure, this provision instructs DOT to

specify the drugs for which individuals may be tested.

With one limited exception, only the following drugs can be tested for under the current DOT rule: marijuana; cocaine; opiates; amphetamines; and, phencyclidine (PCP). That limited exception concerns barbiturates. Under the rule, carriers may, if they have reasonable cause, test for barbiturates with DOT's approval issued after consultation with the Department of Health and Human Services (HHS); such approval, however, must be secured on a carrier-by-carrier basis.

On the other hand, the DOT rule does not preclude carriers from testing for other drugs, as long as they take a separate urine specimen.

According to the preamble to its final rule, 53 Fed. Reg. 47148, DOT's restriction on which drugs can be tested for is based upon the testing procedures HHS established for government agencies, 53 Fed. Reg. 11970 (April 11, 1988), which require the existence of an HHS-established testing protocol and positive threshold.

Prior to the issuance of DOT's final rule last November, a number of NPTC's members were testing their drivers for drugs, including drugs in addition to the five allowed under the rule. For example, one class of drugs being tested for are the "minor" tranquilizers known as benzodiazapems, which include drugs marketed under trade names such as "Valium" and "Librium." As a result of the DOT rule, several of our members have expressed concern that they will have to stop testing for these drugs due to the impracticality, if not impossibility, of obtaining

two separate, but consecutive samples from drivers. Thus, they feel that DOT's rule is too lenient.

NPTC believes that, at the very least, carriers wishing to test for barbiturates should be able to do so generally, and without having to obtain prior DOT approval, and that report language to this effect would be helpful. NPTC also believes that companies should have authority for testing for other drugs without having to take separate specimens.

NPTC also believes that because of the more sophisticated equipment being used by laboratories today the positive threshold required under the DOT rule for the initial screen for marijuana metabolites is too high and could be lowered. Currently, it is set at 100 nanograms. At a minimum, DOT should be instructed to consult with HHS and jointly consider the appropriateness of lowering the initial screening threshold for marijuana.

Section (3)(G), Definition of a "Commercial Motor Vehicle". We note that, by incorporating the definition of "commercial motor vehicle" contained in section 12019(6) of the Commercial Motor Vehicle Safety Act of 1986, S. 561 intends to make drug and alcohol testing applicable to intrastate operations. NPTC commends the Committee for the proposed expansion of drug and alcohol testing to intrastate operations, which we believe would be an improvement in the scope of current DOT requirements.

On the other hand, we question whether the Committee also intends, by this provision, to expand the scope of testing to include vehicles

weighing less than 26,001 pounds Gross Vehicle Weight Rating (GVWR). DOT considered that question as part of its rulemaking and opted to apply its drug testing requirements only to vehicles weighing 26,001 pounds or more, based on the considerably low fatality rate of the smaller vehicles and the "high level of administrative and financial resources" companies will have to incur just to test the drivers of the larger vehicles. Although it is our understanding that, as part of its implementation, S. 561 contemplates a further rulemaking on this issue before DOT could expand the rule to include the smaller vehicles, the language of the bill is not as clear as it could be. Accordingly, NPTC recommends that the Committee report clarify that testing of drivers of intrastate vehicles in the 10,000 to 26,000 pounds GVWR range is not mandated.

S. 561 Should Include a Severability Clause. NPTC recommends the inclusion of a severability clause in S. 561 to ensure that if any portion of S. 561 is struck down the remainder of its provisions will survive. While NPTC believes that the requirements of S. 561 are well within the bounds of the Constitution, such a provision is nonetheless appropriate in light of the possible legal challenges to this legislation or its implementing regulations. Given the Committee's strong commitment to rid the transportation system of drug and alcohol abuse, we suggest that the bill make clear that if any one requirement is struck down the remainder of its provisions stand.

Conclusion

Mr. Chairman, in sum, NPTC strongly supports the provisions of S.

561 mandating drug and alcohol testing for drivers of commercial motor vehicles. While NPTC has some concerns, none of the concerns are with the basic requirements of the bill, but only with the specifics of implementation. Accordingly, NPTC stands ready to provide whatever assistance the Committee may require in advancing the bill toward enactment.

Mr. Chairman, that concludes my statement. We thank you for the opportunity to appear before you today.

* * * *

The CHAIRMAN. Very good, sir.
Mr. Farrell.

STATEMENT OF JOSEPH FARRELL, PRESIDENT, AMERICAN WATERWAY OPERATORS

Mr. FARRELL. Good morning, Mr. Chairman.

I am Joe Farrell, President of the American Waterways Operators, which represents the inland and the coastal towing industry.

With respect to S. 561 I would like to make two comments. First, the inclusion of alcohol testing, elevating it to the same gravity as drug abuse we think is a good thing. As to rehabilitation, we also are certainly generally supportive of that, and I would like to simply echo what some of my colleagues have said here this morning, to avoid, insofar as it makes sense to do so, the mandatory aspects. These are, after all, individual problems and need to be dealt with individually, so that the best possible results accrue in the end.

If S. 561 is taken to include our industry, we would also like you to look at a couple of other things that we think are problems with respect to the testing regime in the drug area, for example. In post-accident testing our mode differs somewhat from our sister modes as a practical matter. As a theoretical matter, however, it seems to me that requiring the industry to conduct post-accident testing is wrong, that that really is a police or investigative function and belongs with the U.S. Coast Guard, which has statutory responsibility for marine safety.

We oppose strenuously the notion that our industry would be required to conduct post-accident testing. In random testing, which is an essential element in deterrence, at least in the drug area. Certainly in the drug area, the 50 percent figure that is now extant for our industry we think may be a bit excessive. In many of the Federal requirements for Federal employees we understand that 20 percent of the population is the level for testing. We think that is an adequate deterrent.

Finally, in the whole testing arena just a couple of comments. We have some very serious problems in three areas.

With respect to seizure, after research on our part, it seems clear that the intent of the legislative branch in this whole area of drugs was to have seizure of vessels correspond with smuggling, and that if personal use is detected, that that would result in apprehending

STATEMENT OF JOSEPH FARRELL, PRESIDENT, THE AMERICAN WATERWAYS OPERATORS

Good morning, Mr. Chairman, and members of the Committee. I am Joseph Farrell, President of the American Waterways Operators (AWO). AWO is the national trade association representing the coastal and inland barge and towing industry. AWO members operate tugboats, towboats and barges in virtually every geographic locale of the United States, both in coastal and harbor service and on the inland waterways system. We are pleased to have the opportunity to appear before the Committee this morning and to present our views on S.561, a bill which will require by statute extensive drug and alcohol testing of safety sensitive workers in the rail, aviation, and motor carrier industries. We will also take this opportunity to comment on other Federal policies and programs designed to address the drug and alcohol problem in our nation.

Mr. Chairman, allow me to begin by underscoring for the record that the barge and towing industry's commitment to an intoxicant-free workplace is profound. That commitment predates by many years these issues becoming highly visible in American society. The barge and towing industry has a strong record of supporting regulations which are designed to remove intoxicants from the marine environment. Moreover, that record is manifested in scores of corporate programs, voluntarily instituted years ago, which absolutely prohibit the possession or consumption of any intoxicant, drug or alcohol, aboard the industry's vessels. The barge industry participated heavily both in the Coast Guard rulemaking process in 1986 to develop intoxication standards for commercial vessel personnel and in the 1988 Coast Guard rulemaking to mandate chemical testing of commercial vessel personnel. That participation was centered largely on strengthening the proposed rules.

Our involvement in both of those rulemakings is a clear reflection of our industry's longstanding commitment to an intoxicant-free marine transportation industry.

Having said that, I would like to first address the matter before us this morning--the safety risks posed by drugs and alcohol in U.S. transportation industries and the manner in which S.561 attempts to address those risks. I propose to then move on to some of the other topics which the Committee is considering and to seek to draw your attention to certain Federal policies and programs which should command Congressional oversight and direction.

There is no question that drugs and alcohol can play a devastating role in transportation safety in the United States. The Chairman's remarks in introducing S.561, and those of Senator Danforth, provide a compelling view of the very difficult problem which these intoxicants pose in our national effort to provide an assurance of safe passage for the traveling public. The seismic impact of the oil spill in Alaska serves as a stark reminder, for anyone who needed it, that a single transgression with these intoxicants in the marine transportation industry could wreak havoc. However, in its deliberations, the Committee should also take into account that in an attempt to identify the extent to which intoxicants in the commercial marine workplace are a problem, the Coast Guard was not able to specifically identify the use of drugs or alcohol as a major causal factor in commercial vessel losses or casualty damage. Furthermore, the Coast Guard acknowledged that the data which it was able to accumulate

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on casualties attributable to the use of intoxicants were sparse and not conclusive. The Alaska oil spill and this lack of conclusive data present an authentic dilemma. The Committee needs to consider both, not just the Valdez tragedy, to avoid taking unreasoned action.

AWO has given consideration to the potential extension of S.561 to the marine transportation industry in preparation for our appearance before you today. Inclusion of the marine transportation industry in S.561 appears to have two primary impacts on the drug testing regime to which we are subject under the Department of Transportation rules. First, as the Chairman has noted, the DOT drug testing regulations do not include testing for alcohol except in post accident or reasonable cause situations. S.561 would extend the alcohol testing requirement to the other required tests as well. That should buttress the already strict and effective drug and alcohol programs which many AWO members have in place which completely prohibit the possession or use of either intoxicant aboard vessels. Noncompliance with the corporate prohibition generally produces the severe penalty of lost employment. By including alcohol in the testing regime, S.561 will be helpful in elevating the gravity with which we view alcohol use to that generally afforded illegal drugs.

Secondly, S.561 requires carriers to establish rehabilitation programs for employees who voluntarily step forward to seek help. The provisions of the DOT regulation which govern the marine transportation industry do not contain a mandated rehabilitation program for employees afflicted with drug or alcohol problems. The Department reached that conclusion

on the basis of extensive industry submissions which argued that rehabilitation decisions must be individualized, and not rigidly required across the board as a matter of government fiat.

The barge and towing industry understands that in order to achieve the ultimate objective of a drug and alcohol free marine transportation industry, education and rehabilitation programs must be available to the industry's employees. Many companies have such programs in place. We believe that rehabilitation and education are not only compassionate and humane, but essential to the success of a drug abatement program as a practical matter. However, while drug usage and alcohol abuse may be widespread in American society, they are ultimately problems which are a part of each individual so afflicted. Therefore, we believe that decisions regarding the type of rehabilitation to be offered, its funding, and indeed, when the opportunity to seek rehabilitation will be provided and when it will not, are difficult questions that can only be answered in response to the particular individual involved and the circumstances surrounding his or her situation. We continue to believe emphatically that these are not situations which can be decided to the individual's benefit through any wooden governmental mandate. AWO therefore suggests that if S.561 is expanded to include marine transportation, the flexibility afforded employers to shape rehabilitation programs now contained in the DOT regulations be maintained.

If S.561 is expanded to include commercial marine transportation, AWO asks the Committee to consider making two amendments to the substance



of the DOT testing regulations which we believe will make them more practical and effective.

First, the regulations require that marine employers ensure that all individuals directly involved in a "serious marine incident" are tested for evidence of drugs and alcohol. The employer is first required to make a timely, good faith determination as to whether a marine casualty, discharge of oil or discharge of a hazardous substance, is likely to meet the regulations threshold of a "serious marine incident."

The barge and towing industry views the absence of a governmental role in post accident testing as wrong. In post accident situations, the conduct of drug and alcohol tests are police and investigative functions which properly reside in government, not in industry. It is fundamentally incorrect we believe, that the regulation provides no role for the agency with statutory responsibility for marine safety and law enforcement in these testing activities, but instead seeks to shift these requirements onto industry which has no experience or resources to conduct the tests. The regulation now requires that mariners determine whether the severity of the marine incident meets the threshold of "serious" and then who among the crew should be tested. The Exxon Valdez tragedy is somewhat instructive in this regard. In that accident, it was allegedly the vessel's Captain who was impaired. Who then would have made these important decisions which the Department of Transportation rules leave to the mariners?

These are matters which the Coast Guard should address. The regulation should provide the mariner with guidelines regarding when he should call the Coast Guard to report an incident so that the agency can decide if testing is in order, and who among the crew will be tested. Post accident testing should be conducted by the United States Coast Guard. Industry supports an appropriate private sector role in post accident testing--that of facilitating the conduct of the tests and assuring that the crew is presented to the Coast Guard in a timely manner. S.561 should correct this deficiency in the Department of Transportation regulations.

Secondly, the regulation requires that marine employers provide for the chemical testing of crew members on a random basis at an annual rate of not less than 50 percent. Both Chairman Hollings and Senator Danforth have spoken to the essential nature of random testing and the strong deterrent which it provides in the effort to stop drug and alcohol abuse. We agree that random testing is a deterrent. However, we view the 50 percent annual testing rate as unnecessarily excessive.

AWO believes that the deterrent effect of random testing is not lessened at a reduced rate of employee testing. Indeed, it is recognized, at least within the Federal government, that random testing at levels below 50 percent provides the intended deterrent effect. AWO suggests that Federal government testing programs now in place, which routinely utilize annual testing rates of 20 percent or less of the covered population, are also appropriate for the marine industry. We suggest that S.561 provide

for this reduction in the mandated annual testing rate.

AWO personally and directly has expressed its concerns with both the post accident testing issue and with the annual rate of random testing to Transportation Secretary Samuel Skinner. We urge the Committee to give each of these matters serious consideration as you move forward with crafting an effective drug testing regime. We will be pleased, of course, to work with you and the Committee staff in the development of provisions to address these issues.

Some months have elapsed since the drug testing rules were first published, enough time for reason and logic to supplant some of what might be termed imprudent measures born in the heat of political campaigns. Therefore, Mr. Chairman, AWO views this Committee's look into the whole matter of testing in the commercial transportation workplace as particularly useful. We agree very much with your belief that this is a matter of national policy, and that it should not be left solely to the perspective of administrative agencies. The broader view of the Congress will be helpful in making the policy more practical and effective. We suggest to you that Congress' oversight would also materially assist other Federal drug and alcohol policies and programs now under development which extend beyond the specific issue of testing. In the marine transportation sector at least, we are witnessing a panoply of Federal initiatives which, despite their laudable intent, have the potential to do great harm to commercial vessel operators.

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The barge industry does not underestimate the severity of the drug and alcohol problem. We believe strongly that an effective effort to rid the nation's transportation sector of this scourge must be one where government and industry address the problem in partnership, with goals that are defined and mutual, and with mechanisms that make sense and are fair to both. Some of what we are seeing emerge from the Federal agencies now suggests to us that the government is seeking to battle the drug crisis not so much in tandem, but more on the back of industry. That has lead to requirements and policies which are, in our view, both inappropriate and excessive. I will cite three examples.

One example of the type of government requirement that we consider not only inappropriate, but punitive to domestic commercial vessel operators, is the Administration's zero tolerance policy. Our vessels ply the rivers and coastal waterways. Obviously, therefore, we are not prime candidates for smuggling operations. In the implementation of the zero tolerance policy, the U.S. Coast Guard and the U.S. Customs Service are conducting joint vessel boardings in the marine transportation industry. When even trace amounts of narcotics are discovered on a crew member or in his or her personal effects, the vessel is seized by the government and taken out of commercial service for an indefinite period of time. Seizure is appropriate when smuggling is discovered. Discovery of personal usage on one of our vessels should impact the user, not the good faith owner or operator. These seizures can take effect when vessel owners are not only not culpable or negligent, but when they have in force clear, firm policies against the use of any controlled substances on their vessels.

The zero tolerance policy makes no allowance for these good faith efforts. It also ignores the clear inequity that seizure of the vessel does great economic harm to the party innocent of any wrongdoing. Notwithstanding the grave proportions of the drug crisis, zero tolerance represents government policy run amok.

I am attaching to this statement a copy of a letter which AWO sent to the leadership of the House and Senate in March of this year seeking Congressional guidance to the agencies of government in curbing the excesses which have become manifest as this array of policies and programs is developed. The need for Congress to step into the breach and infuse these agencies with a healthy dose of guidance and direction is perhaps more acute now than it was then. We have pursued these matters with the agencies at every level and opportunity, and they frankly seem unable to put their own house in order.

An additional example can be found in a regulatory proposal recently published by the U.S. Customs Service which seeks to establish a litmus test by which vessel operators can demonstrate to the government's satisfaction their exercise of the "highest degree of care and diligence" in ridding their workplace of drugs. One of the security measures which constitutes that litmus test is the requirement that employers investigate the background of each of their employees to determine prior criminal activities or narcotics smuggling, or if the employee has a standard of living inconsistent with the salary he or she receives from the vessel operator. AWO takes no exception to the proposition that employers

have a responsibility to take all reasonable and appropriate steps to keep drugs out of their workplace and off their vessels, but they do not have a responsibility to conduct intrusive police activities.

S.561 will require Federal transportation agencies to utilize standards developed by the Department of Health and Human Services that govern intoxicant testing in the commercial workplace and laboratory certification procedures. AWO has taken a position of strong support for flexible regulatory guidance which appropriately protects the rights and privacy of transportation employees, but which avoids the labyrinth of rigid requirements proposed by the Department of Transportation. One particularly offensive provision of this regulatory proposal is its requirement that certain employers submit blind performance test specimens to the laboratories they utilize as part of a quality control regimen of the laboratory. We should note that these laboratories are already certified by the Department of Health and Human Services to engage in the analysis of employee specimens. AWO views the quality control of these laboratories to be part of the certification process, which is a governmental responsibility. We believe it is improper to require employers to submit blind test specimens at their own expense when these tests have no nexus in ensuring that their employees are drug free, which is the objective of the drug testing program in the first place.

Mr. Chairman, I hope these remarks impress upon you the real commitment of the barge and towing industry to an intoxicant-free

workplace. Long before it became fashionable, the barge industry prohibited absolutely the possession of drugs and alcohol aboard its vessels. Well before Federal regulations were contemplated, many operators in this industry had in place effective drug testing programs. The industry has lent its strong support to the development of effective intoxication standards, the implementation of testing regulations and the development of flexible regulatory procedures to ensure that tests are properly conducted and that employee privacy is protected. We also encourage the government to prosecute those who violate the drug and alcohol statutes to the fullest extent of the law. These longstanding and progressive positions in the towing industry provide much common ground with governmental requirements and objectives. But they do not allow us to sanction the shift of governmental responsibility onto industry, intrusive and impermissible investigations of the private lives of our employees, or punitive policies which persecute innocent, law abiding citizens.

Mr. Chairman, we appreciate the work of this Committee in seeking to develop statutes to govern the array of drug and alcohol-related issues facing the U.S. transportation industry. We would be glad to work with you and the Committee staff in achieving that objective and can provide any further detail on those matters addressed in our remarks today which you would find helpful. Thank you for the opportunity to present our views. I will be pleased to answer any questions which you may have.

The CHAIRMAN. You are entirely right. Taking an entire tow for individual use, a person smoking a marijuana cigarette, for example, was not the intent of the seizure law. Yet, you would be interested to know as a taxpayer we pay for the whole DEA.

Do you know our Drug Enforcement Administration makes money? It does not cost us anything. I have to listen to these debates.

Mr. FARRELL. On seizures, I assume.

The CHAIRMAN. Oh, yes; we gave them \$636 million last year, and we drew in from seizures around \$685 million. So we have got a moneymaking operation up here. People do not know it, and that is why I want to spend more money on drugs. It is not costing them anything, and we are saving lives and everything else.

I would agree with you, absolutely, and I thought we put something in one of the bills, but we will, to try to clarify that, because that is a real problem.

On the other hand, does not your insurance carrier require post-accident testing?

Mr. FARRELL. We do not have any quarrel with post-accident testing, Mr. Chairman. We support that, in fact.

The CHAIRMAN. You say that is for the police, as I understand, or for the Coast Guard.

Mr. FARRELL. That is right.

The CHAIRMAN. I would say if I covered you, I would require it. I would call you up and say, Mr. Farrell, look here, after that collision you had in the Mississippi, what about the operator; did you test him? I would say, you act like that is a terrible thing or unthought of, I would think that would be standard operating procedure for the insurance carrier and public tow.

Mr. FARRELL. Would that apply, for example, to driving an automobile, that you would test if you were a passenger, test the driver, or test the passenger?

The CHAIRMAN. Well, I cannot get random testing of all the drivers in America, but that is not going to forestall me taking action in setting a policy with respect to those in public transportation. And we are not talking about everybody driving a yacht down the Inland Waterway having to have post-accident testing.

But you are in the business, and you have got insurance coverage. I am amazed that the insurance companies are not requiring you to do that.

Mr. FARRELL. I am not conversant with whether or not insurance companies require it. And again, we do not quarrel with it. It is who does it that we have a problem with.

The CHAIRMAN. Well, I think both are going to do it. I think I would want, if I were your carrier, to defend myself and know where I stood.

Mr. FARRELL. I understand.

The CHAIRMAN. Mr. Verkler.

**STATEMENT OF JERRY T. VERKLER, SENIOR VICE PRESIDENT,
INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA**

Mr. VERKLER. Thank you, Mr. Chairman.

Mr. Chairman, I am Jerry Verkler representing the Interstate Natural Gas Association. I believe you know that our companies represent all of the major natural gas pipelines. We represent the major natural gas carriers in this country and the major interprovincial natural gas pipeline companies in Canada. We thank you for this opportunity to testify and express our views on your bill, with which we have no problems at all, and what you are attempting to do regarding these public "people" transportation modes.

We do have some problems with the Department of Transportation's proposed rules affecting natural gas pipelines. I want to make it clear that it is natural gas and not liquids; it is gas which I am addressing.

We think that such safety programs for the gas pipeline industry, Senator, under the laws passed by this committee and the Congress, adequately govern natural gas pipelines. Even DOT itself has never been able to find any incident involving drugs or alcohol stemming from a natural gas accident. We are the safest mode of transportation in commerce, including walking, in this country. I think the record is clear.

But we do have a problem with what DOT is proposing to do to us in this area. We feel that they do not have statutory authority to do it because of our being adequately regulated under the Pipeline Safety Act.

Our members are already fully committed to a strong, all-encompassing pipeline safety program. Most all of our members have drug testing programs and have had them for several years. We think there is a distinction between what we are shipping through our pipelines and those modes of transportation that involve people and safety for them. Also, the possibility of pollution that could contaminate our land and our water does not come from gas pipelines.

But we again say that we are safe. We do not have many people operating our pipelines. It is a fully computerized and automated operation. We are high capital, but less intensive with people. We do have a lot of independent contractors that do work for us throughout the country, and we can see some problems with these rules as they are now proposed as they would affect these contractors.

Our basic challenge stems from the fact that the Natural Gas Pipeline Safety Act, which empowers the DOT to set natural gas pipeline safety standards, states that such safety standards shall be practicable and designed to meet the need for pipeline safety. In prescribing such standards the Secretary shall consider relevant available pipeline safety data, whether such standards are appropriate for the particular type of pipeline transportation or facility, the reasonableness of any proposed standards and the extent to which such standards will contribute to public safety.

DOT's consideration of these four statutory criteria was clearly inadequate with their proposed rules. As a result, we do not believe that their final rule in our case is either practicable nor designed to meet the need for pipeline safety.

Further, we believe that DOT has ignored the important fact that an overwhelming majority of our members, as I mentioned before, have already established employee assistance and/or drug

testing programs that actually go further than what they are proposing to require.

They do not consider the nature of our industry and the fact that our employee programs are tailored to individual operating circumstances of gas pipeline companies. They also have failed to recognize that gas pipelines are a unique mode of transportation when compared to other transportation modes which they regulate. Our pipelines, as I mentioned, carry gas. They do not carry people.

Second, gas pipelines are designed with many active and passive safety devices, and they are continually inspected and tested to ensure proper operation. Employees of gas pipelines do not have the same opportunity to make unilateral decisions that could adversely affect safe operation of the pipelines. Gas pipeline employees usually work in teams under close supervision where potential drug-impaired behavior can more easily be detected, and the installed safety devices would mitigate the effects of a drug-impaired individual's actions.

DOT and the industry both strive to maintain the gas pipeline's excellent safety record, and we are going to continue to do so. Essentially, though, DOT has concluded that government-imposed testing is justified in the gas pipeline industry because it is or might be justified in the railway, airline, and other industries. In our estimation, that is not a good justification in view of the in place effective employer drug testing programs and the unnecessary and costly burdens that would be imposed by their final rule.

Thank you, Mr. Chairman.

[The statement follows:]

**TESTIMONY OF
JERRY T. VERKLER
SENIOR VICE PRESIDENT
OF THE
INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA
BEFORE THE
COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION
UNITED STATES SENATE
JUNE 15, 1989**

Mr. Chairman and Members of the Committee, I am Jerry T. Verkler, Senior Vice President, of the Interstate Natural Gas Association of America (INGAA), located in Washington, D.C. INGAA is a national trade association representing virtually all of the major interstate natural gas transmission companies operating in the United States and the major Interprovincial pipelines operating in Canada. INGAA's members operate a natural gas pipeline network that accounts for over 90 percent of all natural gas transported and sold in interstate commerce.

We wish to thank the Chairman for providing us the opportunity to express our views concerning the Department of Transportation's drug testing program -- or at least as it applies to the natural gas pipeline industry.

STATEMENT OF POSITION

First of all, INGAA and its members are fully supportive of appropriate employee drug testing and rehabilitation programs, given the increasing societal problem of drug abuse. We assert, however, our firm belief that such programs for the gas pipeline industry are a legitimate personnel management responsibility of an employer. This is so, given the absence of compelling reasons to displace effective

employer programs with Federally mandated programs such as that promulgated by the DOT's Office of Pipeline Safety.

Our members are already fully committed to a strong, all-encompassing pipeline safety program which, according to annual Department of Transportation and National Transportation Safety Board reports, provides the safest mode of transportation in the United States. DOT, in promulgating its drug testing program for the gas pipeline industry, failed to recognize the effectiveness of our industry's existing safety program and outstanding record. Instead, it chose to cite nationwide drug abuse statistics and simply assume those statistics were valid for our industry, even though it did note that "[n]o data exist to prove or disprove the presence of a drug abuse problem among pipeline personnel." (53 FR 25893). In fact, our members are not aware, and neither is DOT, of any gas pipeline incident that could be even arguably attributable to an employee drug related impairment of any kind.

Because we have challenged the legality of DOT's final drug testing rule by filing a Petition for Reconsideration of the final rule with DOT and petitioning the U.S. Court of Appeals to review and set aside the rule, we are concerned that DOT will attempt to provide some legitimacy to its rule by seeking to add pipelines to your bill, S. 561.

The basis for our challenge stems from the fact that the Natural Gas Pipeline Safety Act of 1968 (49 USC 1671, et seq.), which empowers DOT to set natural gas pipeline safety standards, states:

Such Federal safety standards shall be practicable and designed to meet the need for pipeline safety. In prescribing such standards, the Secretary shall consider --

- (A) relevant available pipeline safety data;
- (B) whether such standards are appropriate for the particular type of pipeline transportation or facility;
- (C) the reasonableness of any proposed standards; and

(D) the extent to which such standards will contribute to public safety.

(49 App. U.S.C. §1672(a)(1)) DOT's consideration of these four statutory criteria was clearly inadequate. As a result, the Final Rule is neither "practicable" nor "designed to meet the need for pipeline safety." *Id.*

Further, DOT ignored the fact that an overwhelming majority of our members have already established employee assistance and/or drug testing programs that cover as a minimum, pre-employment and reasonable cause testing requirements. These programs were established for a variety of reasons including a major concern for employee well-being. DOT's mandated generic drug testing rule does not consider the nature of our industry, and the fact that employee developed programs are tailored to individual operating circumstances of gas pipeline companies. For example, current employer programs take into account the primarily rural, and sometimes remote, locations where pipeline employees are located. DOT's program does not. As a result, the DOT rule will needlessly disrupt existing employer programs and not provide the flexibility necessary to tailor these programs to the needs of the individual companies.

It should also be noted that DOT failed to recognize that gas pipelines are a unique mode of transportation when compared to the other transportation modes regulated by DOT. First, our pipelines do not carry people -- they carry natural gas. Second, gas pipelines are designed with many active and passive safety devices and they are continually inspected and tested to ensure proper operation. Third, gas pipeline employees do not have the same opportunity to make unilateral decisions that could adversely affect safe operation of the pipeline as do employees of other transportation modes. Gas pipeline employees usually work in teams under close supervision where potential drug-impaired behavior can more easily be detected, and the

installed safety devices would mitigate the effects of a drug-impaired individual's actions.

DOT and the industry both strive to maintain the gas pipeline's excellent safety record. Usually, DOT fulfills its role rationally and realistically. That is not the case here.

Essentially, DOT concluded that government-imposed drug testing is justified in the gas pipeline industry because it is (or might be) justified in the railway, airline and nuclear industries. In our estimation, that is scant justification in view of the in-place effective employer drug testing programs and the unnecessary and costly burdens imposed by DOT's final rule.

CONCLUSION

In its very thin analysis, DOT did not adequately consider the gas pipeline industry's excellent safety record. Pipelines, unlike nuclear power plants, trains, trucks, planes, and other vehicular carriers, have experienced no accidents which are even arguably attributable to drug use. DOT found neither a drug problem nor a safety problem among natural gas pipeline companies, and therefore failed to determine whether or not pipeline working conditions contribute to the undisputed excellence of the pipeline industry's safety record.

INGAA endorses the goal of ensuring pipeline safety, and acknowledges the existence of a drug problem in society generally. DOT, however, should not have promulgated any final rule on drug testing without determining whether or not drug use jeopardizes the excellent safety record of the gas pipeline industry. DOT made no such determination, and cannot make such a determination based on the industry's record. It therefore violated its enabling statute when it promulgated its Final Rule.

We are pleased that your proposed legislation (S. 561) recognizes our unique mode of transportation and outstanding safety record.

I will be happy to answer any questions you may have. Again, Mr. Chairman, thank you for inviting us to participate in this hearing.

The CHAIRMAN. Senator Exon.

Senator EXON. Mr. Chairman, thank you very much. Gentleman, thank you for being here. This is a very important matter to all of us. Mr. Briggs, I was interested in your testimony because you alluded to the fact that truck drivers should be included in the act. It was this Senator who brought truck drivers into the act with an original amendment when we were talking about railroad engineers. I did not think about it from a competitive standpoint between the railroad industry and the trucking industry.

I thought of it as a safety standpoint, and I happen to agree with you that the average person is in more jeopardy from trucks, since trucks are on the road each and every day, that is a major traffic problem, and so I think that we have unanimously agreed that including truck drivers in the act is necessary.

Let me give just a brief sermon to all involved in this. Everybody is looking out for one's individual rights and there is nothing wrong with that. And Constitutional rights are very important. It is this senator's opinion and I think the opinion of many of us in the Congress that this drug problem, illegal drugs particularly, and alcohol coming right along with it, are such a threat, but alcohol has long been a threat. And we have not begun to lick that problem yet.

But illegal drugs are a new threat that is striking at the very heart of our society and, I think, causing much more of the organized crime effort and the rampant crime that we see here in the capital of the United States as well as in all of the other major cities. What we are talking about are some stringent actions that we are going to have to take, it seems to me, to get to the heart of this matter to save our society. It is that important. And I think that is not an overstatement. So all of us are going to have to give up some of our "individual rights." Now we want to do it fairly.

I was particularly interested, I believe, in your statement, Mr. Farrell, that 50 percent tests may be too high. I tend to agree because I believe that random drug testing primarily is the heart, the soul, the thrust of this legislation. And the heart and soul and thrust of that is deterrent. If someone feels that they can get by with something, then they are going to continue. But the deterrent effect of maybe losing my job because I use drugs, I think, are going to dry up an awful lot of people.

It was evident, Mr. Chairman, and I do not know whether you knew about it or not, but in this room we had an Armed Services Committee meeting a couple of weeks ago, and at that table we had the personnel chiefs of all of the branches of the armed services. And right down the line, in response to my question, they conceded that they were not sure, just as you are not sure, as to the use of illegal drugs in the military. But they were confident that as short as three or four years ago, up to 25 percent of the people in our armed services were using illegal drugs.

Today they know what it is and they have reduced that from what they thought it was down to 1.5 percent. And, without exception, Mr. Chairman, they gave the credit to the deterrent effect. People were not going to take the risk if they had a risk of being caught. It gets us down to the situation of we've got to do that in the working place.

One of you indicated that you were not sure that you had as high a use of drugs in your particular company as some others. I suspect you are wrong, because it seems to me that statistic after statistic have proved that you just do not understand the depth of the problem in present day society.

Let me ask you as a group, those who have not referred to it, what do you think should be the amount of testing that is necessary to get the deterrent that we are after? Fifty percent does seem too high. Is 20 percent a more reasonable figure?

Mr. FARRELL. That is the figure I suggested.

Senator EXON. That is what I thought, Mr. Farrell. How about the rest of you?

Mr. BRIGGS. Well, Senator, we argued with the Federal Railroad Administration for a lower percentage than what they eventually came out with, but there is at least, I think, the safeguard, that if the initial testing at the 50 percent level produces a substantial result, it can be modified afterwards and reduced.

And some would argue if you are going out there the first time to really get them aware, you ought to give them a good shot; so there are two sides to that question. All I would hope is that if it proved it worked there and if lower levels would do the trick, then FRA would move to the lower levels.

Mr. BERGOFFEN. We would agree with Mr. Briggs on that. I think it is a judgment call. Gather enough at the outset, to make a difference and then use the data that you get to perhaps adjust later on.

Mr. WARD. Basically, I would agree, Senator Exon. Let me add, too, I did not wish my belief that it is not high in my company to overshadow my earlier reply. The real answer is "I do not know," and we do not know, and I think that is the important answer.

The second thing with regard to how much, I think the key is exactly what you said. It is the deterrent; we want to create the deterrent. And I personally believe 20 percent would be more than adequate to create a deterrent.

Senator EXON. Let me ask each of you about the matter of random testing, and one of the oppositions that we have heard over and over again and one which I have spent a considerable amount of time trying to resolve. How are we going to keep the perceived belief that management is going to use this as a tool against an individual who works for them? I suspect that to say, "Well, that is not possible" out of hand is not accurate, and therefore I have spent a lot of time on it.

Your plans that you are supposed to complete by, what, October 1, is that what you testified to? I am wondering what you are doing about random testing. I have come up with several ideas that I think might be useful. Rather than names, maybe we should have a computer select Social Security numbers of your employees, something like that to keep it as random as possible.

And I think maybe we could make an additional step in that area if we want to be totally fair and have someone outside of the company come in to run the computer and to make the selection of what numbers do come up, not unlike the heralded Oscar awards that are sealed in an envelope by a CPA firm before they are announced to the public at large. I do think steps should be taken

with regard to making certain that the random tests are indeed random and not selective. How do you view that?

Mr. BRIGGS. Senator, a number of the features you talked about have been incorporated. In truth, it is easier to defend the pure non-discriminatory nature of random testing than it is some other types of testing—for example, reasonable suspicion testing, where two people go down and they look and one says someone appears to be impaired, and someone else says, yes, they do.

I mean, the numbers will be drawn by lot in an audited basis, and the procedures will be there for everyone to see. It is going to be, in effect, a raffle and that is easier to defend that way. There is not any management judgment as to whether or not you move in one direction or another; it is just scientifically drawn.

And so I do not think that will prove to be a problem. It is a problem with other forms of testing, human nature always having a doubt. But this one should be relatively trouble-free.

Mr. FARRELL. Senator, it may be old-fashioned or even naive, but I think we ought to have faith in people. After all, I think the great, great majority of people in management positions in all these modes are going to strive to have random testing, that they are not going to try to use that as a weapon against an individual employee. After all, there are two other significant opportunities there. One is that there is a reason for wanting to get rid of the person, good or bad. There are other ways to do that.

And second of all, that there is some form always available, maybe not as much as it should be, but there is always some form of appeal, that if somebody, his colleagues, see that he is being singled out, there are certain actions that can be taken. But, at face, I think you really ought to have faith that people are going to try to do this the right way. We all care as much as you all do about it, maybe more.

Senator EXON. Thank you. Did you have something to add?

Mr. BERGOFFEN. I might add that you cannot avoid those kinds of concerns. I mean, they are going to happen. But it requires a great deal of communication between management and employees. Human resources people are going to need to be involved, in implementing these kinds of programs.

Senator EXON. Thank you, gentlemen. Thank you, Mr. Chairman.

The CHAIRMAN. Senator Danforth.

Senator DANFORTH. Mr. Briggs, the Federal Railroad Administration has had testing regulations in place for three years now, and I am told that something like 18,000 employees have been tested. So you would know how this program is working as a practical matter. My question is, how is it working? Is it administratively something that can be done? Is it practical? Is it a headache? How do you feel about it?

Mr. BRIGGS. The programs that have been in effect involve post-accident testing and reasonable cause, not random testing. The random testing for drugs, of course, has not yet started. The existing programs show several things. It is a program that, like any new program, came with some headaches, but is operating reasonably well now.

I think the employees understand when they may be tested. They may disagree as to whether there is reasonable suspicion, but they understand the rules of the game. The supervisors do too, which is important. You think you have a good program; you just have to make sure your supervisor understands it the same way. And we have not had a lot of complaints about that program.

I think the most dramatic consequences of that program, or result, was the very high percentage of the infractions that involved drugs. The statistics are in my testimony, but I think when you look at the number of people that tested positive that were picked up on reasonable suspicion or in post-accident, the greater percentage of them involved drugs. There was a relatively low percentage that involved alcohol. To me, that was a startling result. There are some differences in the way one substance stays in the body compared to the others. But it has been successful.

But at the bottom line, we just do not think that there is a deterrent as great as random testing. I mean, the others help; we have pre-employment testing, annual physical testing, testing when you come back from extended sick leave, reasonable suspicion, and accident testing. But it just does not have the same effect as random testing, in our opinion. We think this will be a significant additive.

Senator DANFORTH. John Riley said random testing was the essential ingredient in a drug program. Ricky Gates, the engineer of the Conrail locomotive that was involved in the Chase, Maryland, disaster, said the same. Do all of you agree with that, that random testing is an essential ingredient?

Mr. BERGOFFEN. Yes.

Mr. WARD. Yes, Senator, we do.

Senator DANFORTH. Now, how about the question that Senator Exon raised, particularly, Mr. Briggs, in the railroad industry where there have been some 18,000 tests that have been made? Is it in fact because of a lot of strife and contention between employers and employees? In fact, do employees believe that they have been abused or is this something that is a rare occurrence?

Mr. BRIGGS. Well, I am sure that somewhere there are some employees who feel that they were abused. But the level of complaint has been relatively low, but, again, I go back to what kind of tests they are. You know, you come in and you apply for a job. You want a job; you have to go through the drug screening. That is not unreasonable.

And, similarly, when you have physicals, they check for drug abuse. They have a bad accident, there is a federal rule that says in that case you have to test under certain conditions. So they have got to be tested. Reasonable suspicion, that is a little bit more difficult, but that means that there is a supervisor and someone else out there who perceive that someone was impaired.

So I am sure that there are some mistakes made. It would be foolish to assume you could take all those tests and someone, somewhere, did not have perfect judgment. But I think the programs have generally worked well.

Senator DANFORTH. I suppose that if you took a sample of people who had been stopped by traffic policemen, there would be a percentage of them who would feel that they were being abused and

singled out for special treatment, so I think that that is human nature for people to complain, "Why single me out?"

Mr. BRIGGS. And there also, I think, is a higher level of complaint whenever you start a new program and people do not really understand it. What are their rights? What are the company's obligations? What are the federal laws? But I think, generally, those programs are working well.

Senator DANFORTH. How often are locomotive engineers tested for drug and alcohol now? How frequently, as a matter of course?

Mr. BRIGGS. Do you mean with the annual physicals?

Senator DANFORTH. It is at least once a year, right?

Mr. BRIGGS. Yes.

Senator DANFORTH. Do they give urine samples and blood samples?

Mr. BRIGGS. Yes.

Senator DANFORTH. How about airline pilots? I am told the airline pilots also, do they not—and maybe I could just assert that.

Mr. BRIGGS. You would also have a test if they had been away for an extended period and returned to service.

Senator DANFORTH. The waterways operators, do the employees in your various industries get physical examinations as a matter of course?

Mr. FARRELL. Yes. In the waterways industry, that is generally the case.

Senator DANFORTH. And blood samples and urine samples are taken during those tests?

Mr. FARRELL. Yes.

Senator DANFORTH. The point I am trying to get at is it would not be breaking new ground to subject anybody to a urine test or to a blood test, right?

Mr. FARRELL. Procedurally, yes. I mean, it is a different issue, obviously, but procedurally that is correct.

Senator DANFORTH. But if it is an invasion of privacy to take a urine test, we have been doing that for a long time and in a lot of different industries, haven't we?

Mr. FARRELL. That is right.

Senator DANFORTH. And the same is true with the blood test. Thank you, Mr. Chairman.

The CHAIRMAN. We thank you very much. We have also another very important panel here this morning. The record will stay open for questions by the other members.

Thank you very much for appearing here this morning. Next, we have our panel. From the Railway Labor Executives, Mr. Lawrence Mann; the United Transportation Union, Mr. Fred Harden, the president; Captain Richard B. Stone, the chairman of the Aeromedical Resources of the Airline Pilots Association; Mr. Carl Langrebe, the special assistant to the president of the National Marine Engineers Beneficial Association, and Mr. Michael O'Connell, general counsel of the Owner-Operators Independent Drivers Association. And the record would show that the airlines declined to testify in the previous panel.

Very good. Mr. Mann, we welcome you, and, as in the previous panel, we want your statements that we have here and have reviewed. They will be included in their entirety in the record and

we will put into effect our rule of three minutes so you can summarize your positions and be ready for questions.

STATEMENT OF LAWRENCE MANN, COUNSEL, RAILWAY LABOR EXECUTIVES' ASSOCIATION

Mr. MANN. Thank you, Mr. Chairman. As you know, in your dealing with rail labor, we like the direct approach, as you do; maybe we are too direct at times. But the Secretary mentioned "red herring" in his testimony, and I want to put that to rest, if I may.

He raised the issue of the right to have a second sample tested if the initial sample is tested positive, with a confirmation test. Well, I would like to point the committee to the existing FRA random regulations. They provide just that. The secretary in testifying before you here stated that should not be allowed; but in his own random regulations, it provides that the employee can get a second test of the sample. So we find some problem with his statement—it is a red herring. It is provided in the regulations right now.

Another red herring I would like to put to rest is the issue of rehabilitation. Senator Danforth, it is not a federal right of employment. Rather it provides the railroad shall afford the opportunity to rehabilitate that person. That person may never get rehabilitated, but it is at the complete discretion of the medical review officer of the railroad to determine whether or not that employee can go back to work. The statute does not mandate it. It states if you successfully complete rehabilitation, he may return to employment.

Many employees will never get back to work because they obviously have a problem with alcohol or drugs. But for those who are completely rehabilitated, I have to ask, what is wrong with a completely rehabilitated person having the opportunity to work again? Under your bill, you just simply throw the person out on the street. You do not really accomplish very much by doing that, because that employee is going to go to some other industry which creates another problem.

But a built-in rehabilitation program cannot hurt anything. Frankly, in the rail labor industry, we do not see how that can hurt anything, particularly because the right to get back to work is at the exclusive discretion of the medical review officer of the railroad.

Some other points with your legislation as compared with the House legislation. Your approach is really not, in our judgment, a comprehensive approach because even though you mandate random testing and you state that it should be subject to the ADAMHA guidelines, et cetera, you do not deal with the mechanics and details of the problems that exist.

I have submitted, in our testimony, 78 exhibits. I can give you hundreds of examples of problems that we have had with existing federal regulations and the application of the regulations. And they can be improved.

Just because the Federal Railroad Administration promulgated a regulation that has been held by the Supreme Court to be Constitutional does not mean it is fair and reasonable in all respects. There are problems with it. And we are trying to demonstrate to you

those problems can be corrected; they can be corrected easily. We hope that you would give it some close attention. Thank you very much.

[The statement follows:]

June 15, 1989

TESTIMONY OF LAWRENCE M. MANN
RAILWAY LABOR EXECUTIVES' ASSOCIATION

BEFORE THE SENATE SUBCOMMITTEE ON
SURFACE TRANSPORTATION
Committee On Commerce, Science And Transportation
On S. 561
Random Alcohol And Drug Testing

My name is Lawrence M. Mann and I am an attorney representing the Railway Labor Executives' Association ("RLEA") in this pending legislation. The RLEA represents the railroad workers of the following organizations:

American Railway & Airway Supervisors' Association,
Division of TCU
American Train Dispatchers Association
Brotherhood of Maintenance of Way Employes
Brotherhood of Railroad Signalmen
Brotherhood of Railway Carmen, Division of TCU
Brotherhood of Locomotive Engineers
Hotel Employees & Restaurant Employees International
Union
International Association of Machinists & Aerospace
Workers
International Brotherhood of Boilermakers & Blacksmiths
International Brotherhood of Electrical Workers
International Brotherhood of Firemen & Oilers
International Longshoremen's Association
National Marine Engineers' Beneficial Association
Sheet Metal Workers' International Association
Seafarers' International Union of North America
Transportation Communications Union
Transport Workers' Union of America

We acknowledge the Supreme Court's decision concerning the constitutionality of "for cause" testing. While we disagree with the

decision, we will abide by its ruling. Nevertheless, that case will not prevent labor's continuing quest to attain fairness in the Federal Railroad Administration's ("FRA") testing program. The FRA random rulemaking, which also revises some of the for cause rules, makes a few procedural improvements. However, those rules need major revisions to assure fair and reliable testing. Senate Bill S. 561 does not accomplish that goal. Rather, it simply has the effect of duplicating the provisions already contained in current FRA regulations.

Rail labor remains opposed to the concept of random testing, but supports most procedural provisions in H.R. 1208, as reported. Rail labor shares the same goals as everyone else -- to rid the rail industry of alcohol and drug abuse. We do differ with some in how to accomplish that result. We believe, and the recent evidence supports, that Operation RedBlock/Stop offers the best method of attaining an alcohol/drug free workplace. These programs are very effective at deterring alcohol and drug use. Operation RedBlock/Stop has built up a level of trust among the workers and attitudes have dramatically changed on those railroads where the programs exist. Random testing, however, is incompatible with the successful cooperative efforts that rail labor and management have undertaken and will interfere with this cooperative approach.

We recognize that hysteria and inaccurate perceptions continue to exaggerate the scope of the alcohol and drug problem in the railroad industry. Also, we realize that it may be difficult for some members of Congress to take a stand and publicly state that the Government's random program has gone too far. The strength of this

country is founded upon individual rights. The erosion of those rights by the Supreme Court does not mean the Congress should follow that path. Rail workers now are subjected to numerous potential alcohol and drug tests each year. Initially, potential employees are given a pre-employment drug screen. Once hired, the entire crews, with few exceptions, are tested after (1) major accidents with fatalities, hazardous materials release with injury or evacuation, property damages exceeding \$500,000; (2) collisions with injuries or damages exceeding \$50,000; or (3) employee fatalities in a train incident. Additionally, the railroads test (4) upon suspicion of impairment; (5) employees involved in a reportable accident/incident in which it is suspected that the employee contributed to the occurrence or severity; and (6) an employee involved in certain rule violations (such as passing absolute restrictive signals, failure to stop short of a derail, issuance of a train order that does not protect a train, and excess speed). The above testing is pursuant to the FRA rules. Furthermore, most of the major railroads also test employees (7) during periodic physicals (semi-annually or annually); and (8) return to duty either from illness, injury or furlough.

The addition of random to the above testing has little chance of being an effective deterrent. As one judge recently stated, in reviewing the government's random testing, it is nothing more than looking for a needle in a haystack. Furthermore, collective punishment, searches and seizures based upon suspicion of entire classes have consistently been regarded as abhorrent to the Constitution. To date, the National Transportation Safety Board has

not advocated random testing. We are attaching to our testimony a letter dated November 8, 1988, from James L. Kolstad, Acting Chairman of the NTSB to Fred Hardin, President of the United Transportation Union, which states the Board's reasoning why random testing is not recommended. Also two of the nation's largest railroads, CSX and Burlington Northern (BN), do not support the FRA's random regulations and we are attaching correspondence from the CEO's of both CSX and BN showing their opposition. The CSX petitioned the DOT for reconsideration of its random rulemaking. The former Administrator denied the petition, but Secretary Skinner has agreed to review that denial.

Supreme Court Justice Antonin Scalia in a lecture on April 6, 1989, at the University of Georgia School of Law stated that permitting random drug tests of employees is going "off the deep end a little" to fight the drug crises. He acknowledged that opposition to drugs could erode the rights of individuals. Of course, Congress is in a position to protect those rights.

It is highly unlikely that the FRA's random requirements will appreciably reduce the positive rate below the results from the above-mentioned current testing programs. For example, on CSX which has in effect Operation RedBlock, positive test results in 1988 were approximately 3%. Similarly, on the BN of approximately 14,000 tests given in 1988, the results were only slightly higher than CSX's. See the attached letter from the Chief Medical and Safety Officer of BN to the FRA Administrator dated February 2, 1989.

In view of the above results, if the Committee does not delete the random testing provisions, a change to the proposed bill is necessary to allow for a waiver. Current FRA regulations provide that a railroad may seek a waiver from compliance with the regulations if it is in the public interest and is consistent with railroad safety. We believe the existing standard is too general. (See 49 C.F.R. § 219.7). Such section should be amended to set a more objective standard for a waiver. If a railroad's existing alcohol and drug testing program can demonstrate that its prior year's test results do not exceed a maximum percentage of positive tests, as compared with the national average on the railroads, and that accidents caused by human error are lower than the national average, then the Secretary should be required to grant a waiver from FRA's rules. Any such waiver shall remain in effect until the Secretary determines that continuing the waiver is not in the best interest of safety.

Now, we will direct your attention to specific abuses by some railroads; these examples will demonstrate to you why the provisions in H.R. 1208 are necessary to eliminate such improper practices. For the most part S. 561 does not address these concerns. The lack of human sensitivity of some railroads in administering their alcohol and drug testing programs is deplorable. These examples are not isolated instances, but, rather, are representative of the nature of the problems encountered by the rail workers nationwide. A total of 78 exhibits will be referred to. In view of the bulk of the materials we are lodging one copy with the subcommittee for its perusal.

Subsection (r)(1) In H.R. 1208

Subsection (r)(1) requires rail carriers to establish a drug testing program pursuant to the specified guidelines which testing will be conducted at the carrier's expense. S. 561 does not provide for this protection. This language is necessary to prevent abuses such as those demonstrated by Exhs. 1-3 wherein hospital personnel required the employees being tested to sign forms accepting responsibility for payment of hospital testing charges.

Subsection (r)(2)(B)(iii) In H.R. 1208

Subsection (r)(2)(A)-(C) of H.R. 1208 sets out the circumstances under which employees may be tested. S. 561 simply gives the Secretary authority to do what already has been done. Subsection (r)(2)(B)(iii) of the House bill provides for drug and alcohol testing as part of the "scheduled, routine employer-required physical examinations." This is clarified with the requirements that the primary purpose of the physical be other than drug or alcohol testing, they be no more frequent than annually, there is reasonable notice, and testing be conducted on a non-discriminatory basis. These limitations are needed to prevent spontaneous physical examinations and physical examination testing which do not follow the required procedures. (See Exhs. 26 and 33).

Subsection (r)(2)(B)(iv) In H.R. 1208

Subsection (r)(2)(B)(iv) allows for testing "upon return from illness or injury which requires an absence of more than 30 days." This 30-day time requirement is included to prevent arbitrary testing for minor injuries or recurring problems such as those which occurred in the facts shown by Exhs. 22 and 73.

Subsection (r)(2)(B)(v) In H.R. 1208

The third circumstance for testing is two-pronged. It involves testing "immediately following" a railroad accident or incident involving loss of human life, serious bodily injury, or property damage in excess of \$50,000 in value. If any of the conditions of the first prong are met, the determination of which members of the crew to test is subject to a second prong, which requires that there be a "reasonable basis" to believe that the specific employee may bear some responsibility for the accident or incident. Though this provision gives wide discretion to the carrier, it provides at least a two-tiered approach in determining potential responsibility.

There have been many instances where employees were subjected to testing as a result of very minor injuries (Exh. 11, 20 ¶4, 25) and illnesses (Exh. 9, 24 ¶6). Other cases of unjustified testing have occurred when an employee is seriously injured on the job, but where there is no evidence showing the employee to be the cause of the accident or incident. (See Exhs. 6 and 67). These testing abuses should be substantially curtailed with the "reasonable basis for responsibility" requirement, but, further specificity would be beneficial. For example, the "requiring medical attention" standard should be replaced with a more stringent standard to be determined by the Secretary, which would help clarify "serious bodily injury" and would thereby eliminate testing for minor injuries and illness. (See Exhs. 6, 9, 11, 18, 24, 57 and 67). For example, this new standard would have prevented the drug testing of employees Donald Thwaites (See Exh. 11) and S. Turner (See Exh. 24 ¶6). Mr. Thwaites was tested after receiving three stitches for a cut on his

hand which he sustained while repairing a shunted signal wire. Engineer Turner was ordered to submit to testing after calling in sick for what was later diagnosed as a sty in his eyelid. Additionally, incidents involving criminal acts perpetrated against employees should be deleted from those circumstances resulting in possible testing (See Exhs. 13, 18, 24 ¶1). See for example, Exhibits 13 and 18 where railroad employees were tested after being the targets of vandals. Conductor C. C. Clark was required to undergo a urinalysis after being struck in the head with a brake shoe; while an engineer was tested after being hit in the face with a stone, both by unidentified vandals.

The authorization of testing following a railroad accident involving property damage in excess of \$50,000.00 (Subsection (r)(2)(B)(v)) is necessary to prevent testing in every incident where property is damaged. (See Exhs. 19, 21, 34 and 37). Where the property damage is inestimable or where it exceeds \$50,000.00, the "reasonable basis" requirement will prevent testing of those employees where there is no evidence to support a belief that a particular employee or crew was responsible. (See Exhs. 1, 10, 21, 31, 39, 54, 58 and 61). See for example, Exh. 21 where an engineer was arbitrarily tested with no reason to believe that he was at all responsible for an accident from which he was a mile away at the time it occurred. Though accidents/incidents due to equipment malfunction and acts of nature (i.e. ice, wind gusts) should rule out testing of the involved crew under the "reasonable basis" standard, it is necessary to add specific exceptions to the provision for such occurrences. (See Exhs. 54 and 58 which involved derailments

caused by broken wheels; see also, Exhs. 10, 31 and 61 which involved derailments due to natural causes).

Subsection (r)(2)(C) In H.R. 1208

The final circumstance upon which testing is mandated involves situations where an employer has a good faith suspicion that an employee's job performance is or is about to be impaired due to the influence of alcohol or a controlled substance. (Subsection (r)(2)(C)). H.R. 1208, in an attempt to limit employer abuses, requires that "reasonable suspicion" be based on "the specific personal observations" of at least "two supervisory employees," that can be articulated in writing, with one supervisory employee having "at least 8 hours training" in such recognition of drug and alcohol impairment. The current FRA rule requires only 3 hours of training and it is woefully inadequate. There is no recognized expert in the country who will state that 3 hours training is sufficient for purposes of detecting drug usage. This standard will help prevent arbitrary testing and employee harassment. (See Exhs. 5, 7, 27, 32 ¶2, 59). In one particular incident an assistant conductor was tested because he was persistent in his attempt to have a safety hazard investigated. (See Exh. 5). Other abuses have involved testing based on anonymous phone calls (see Exhs. 7 and 27), missing a call for work (Exh. 59), and after minor derailments of undetermined cause. (Exhs. 32 ¶2, 23 and 50). Not one of these cases was coupled with "reasonable suspicion" of impairment, nor evidence of employee fault.

The House bill goes on to specify certain violations of operating rules which themselves shall constitute grounds for reasonable

suspicion. Subsection (r)(2)(C)(i)-(x). This provision does not adequately protect employees, and as specific individual cases indicate, would result in unjustified and selective testing and permits continued service after testing has been ordered. (See e.g. Exh. 78).

There have been many instances where either one employee or an entire crew was tested for alleged rule violations, when there was clear evidence to support equipment malfunction as the cause of the accident or incident instead of a rule violation. (See Exhs. 4, 8, 14, 15 and 17). One case involved an unflagged and unlighted derail which resulted in a derailment. Though this incident was due to the failure of the carrier to adequately mark the derail, an employee was tested for failure to stop short of a derail which he could not reasonably have been expected to see at 5:00 a.m. (See Exh. 4). That testing was unjustified and should be prohibited.

Subsection (r)(2)(C) seemingly authorizes testing of an entire crew, or in some circumstances more than one crew, merely because their train was involved in a rule violation. This overly broad authorization has resulted in many instances of unjustified and selective testing. There have been numerous instances where one member of a crew has admitted being, and was obviously responsible for the rule violation, and yet the entire crew was tested. (See Exhs. 12, 16, 36, 38). In one particular instance, the head brakeman admitted responsibility for a switching mistake but yet the entire crew, including the conductor and rear brakeman who were one mile away on the caboose, were subjected to testing. (See Exh. 38). Other cases of unreasonable testing involve the testing of

one crew, when it was another crew who either admitted being, or was obviously, responsible for the incident. (See Exhs. 28 and 32).

This type of selective testing has also been the practice within one crew. For example, when an engine went off a derail as a result of a combination of factors involving several employees, the railroad singled out only the fireman and engineer for testing. (See Exh. 40). This shows prejudice against certain employees and doesn't do much for morale among the crew. (See Exhs. 1, 20, 32 ¶1, 40, and 62).

In order to prevent harassment and "witch hunting" by overly zealous carriers, there must be a "reasonable cause" limitation in instances of rule violations before they are deemed to constitute "reasonable grounds for suspicion." (See Exhs. 14, 17, 30, 35 and 36). This limitation could be similar to that in subsection (r)(2)(B)(V) which requires testing only where there is "a reasonable basis to believe the particular employee may bear some responsibility for the accident or incident." This would properly limit rule violation testing to the individual or individuals who are reasonably suspected of being at fault.

Furthermore, even where there has been a rule violation, we submit, that the responsible employees should not be required to undergo testing unless there is "reasonable suspicion of impairment" as set out in subsection (r)(2)(C). There are many instances where a crew will make a mistake or misunderstand a direction due to pure and simple human error and not drug or alcohol impairment. Under such circumstances the crew may fairly be subject to questioning which will determine whether testing is justified. (See Exh. 30). Also, some carriers have demonstrated that when certain conditions

benefit them -- that is, saves time and money -- they will follow safe procedures. However, some carriers will assume the hypocritical position of ordering the testing of employees following an incident, but then requiring the employee to continue in service. In order to prevent such hypocrisy, it is necessary to establish prohibitions on continued service following an incident on which testing may be based.

No matter what the circumstance for testing, a firm standard needs to be set which requires that priority be given to medical attention for treatment of an injury, rather than to drug and alcohol testing. (See Exhs. 3, 6, 13, 31, 55, 67). The abuses in this area are unconscionable. In one case an engineer who was seriously injured in a derailment was denied several requests for medical attention for 7 hours after the incident. There is no reason for such treatment even where the employee may be at fault.

Subsection (r)(3) In H.R. 1208

Subsection (r)(3) provides that no employee or job applicant "shall be required to undergo drug and alcohol testing except in accordance with the procedures provided in [that] subsection." This provision is one of the most important in H.R. 1208 in that it sets quality uniform standards with which all rail carriers must comply. At present the rail workers are being subjected to 3 different sets of testing procedures which have created much tension, anger, and confusion. In addition to FRA's imposed comprehensive testing, the railroads throughout the country have instituted their own testing rules, which differ from the FRA rules. If this were not confusing enough some states also have begun testing railroad workers. The

House bill eliminates independent and sometimes conflicting carrier policies which may result in abusive testing. (See Exhs. 42, 43, 44 and 55). S. 561 does not contain such protection.

Subsection (r)(3)(A) In H.R. 1208

This section requires notification by employers to employees of testing procedures and employee rights and obligations relating thereto. This has not been provided by some carriers (see Exhs. 44, 47 and 52), and is not in S. 561.

**Subsection (2)(B) In S. 561 And Subsection (r)(3)(B)
In H.R. 1208**

Employers will be required by this section to comply with the guidelines for federal workplace drug testing programs promulgated on April 11, 1988, by the Alcohol, Drug Abuse and Mental Health Administration (53 Fed. Reg. 11,970) (hereinafter "ADAMHA guidelines"). S. 561 and H.R. 1208 have similar provisions here. However, H.R. 1208 is more comprehensive and sets out more protections. Mass testing coupled with the job pressures in a lab increase the chance of error. Because even a relatively small error rate represents large numbers of employees who will be unjustly accused of drug use resulting in social stigma and job loss, it is imperative that the standards which govern testing procedures assure the greatest accuracy possible. The ADAMHA guidelines provide stringent scientific, technical and procedural rules covering chain of custody, laboratory certification, confirmatory testing, medical review officers, cut-off levels, confidentiality and privacy requirements. These guidelines will help prevent mistakes made by

hospital personnel unknowledgeable as to required procedure (see Exh. 14) and will eliminate the use of unqualified labs (see Exh. 41 ¶3). With set procedures being followed, situations involving questionable integrity of specimens will be avoided. One railroad carrier initiated sanctions against an employee who they thought was guilty of diluting his sample with water, though there was no proof of this nor were precautions taken to prevent such a possibility in the first place. (See Exh. 66). The privacy requirements and limitations as to authorized personnel will help prevent railroad management from playing a role in the testing procedure. (See Subpart B, 2.2(d)-(f) of the ADAMHA guidelines; see also Exhs. 3, 34, 60, 61). In many instances railroad officers observed the taking of urine specimens and in some cases took part in the labeling and packaging of the specimens. (See Exhs. 32 ¶1, 41 ¶2, 60, 61). This, along with observation by the opposite sex at the collection site will be avoided under the ADAMHA guidelines. (See Exh. 48).

Subsection (r)(3)(C)&(D)&(I) In H.R. 1208

Each employer is required to hire a qualified licensed physician to serve as a medical review officer, who shall be informed by each employee being tested of any medication or other legal substance which they have used that might affect the outcome of the test. (Subsection (r)(3)(C) and (D)). This medical review officer shall then verify each confirmed positive result discounting for any substances disclosed, with any doubt as to the outcome resolved in favor of a negative finding. S. 561 does not spell out these requirements.

A licensed physician is needed to prevent unqualified railroad personnel from making determinations based on test results (Exh.

49). A medical review officer is also necessary to ensure that all medication and other legal substances which the employee may have used will be taken into account in making such determinations. (See Exhs. 29, 33, 49, 51 and 53). As shown in Exh. 51 a railway employee had to argue with the testing physician for 20 minutes in order to get him to enter on the form the medication the employee was taking at the time. This information is very important given the fact many employees ingest medicines legitimately which may turn up as positive results for controlled substances.

The medical review officer, in verifying results, shall resolve any doubtful outcomes in favor of a negative finding. Subsection (r)(3)(I). This provision will prevent the innocent from being unjustly accused (See Exhs. 66 and 68). As shown by Exh. 68 an employee was held out of service based on a positive result in the urinalysis despite the fact that the blood test came back negative.

Subsection (r)(3)(E) In H.R. 1208

This subsection requires that each employer "compensate the employee for any time lost and for reasonable travel expenses in order to provide the specimen." As demonstrated by Exh. 22, employees in some cases are required to foot the bill. There is nothing in S. 561 covering compensation.

Subsection (r)(3)(G) In H.R. 1208

Subsection (r)(3)(G) provides that "each employer shall assure that an unbroken chain of custody sufficient to protect the sample from tampering and to verify the identity of each sample and test result, is maintained." S. 561 incorporates the FRA's existing rules in connection with chain of custody. There have been numerous

problems surrounding chain of custody. Samples have been left unattended in trafficked areas (Exhs. 2, 53 and 64), the samples have been put together in a group before labeling (Exhs. 41 ¶1, 53) and the individuals tested are almost never allowed to witness the sealing and labeling. (See Exhs. 24, 59, 63 and 64). In fact, in some instances the employees were never asked to initial their samples. (Exhs. 24 and 63). Other questions arise regarding a lab's failure to document or even attest to chain of custody and the ability of railroad officials to assume a role in the chain of custody. (See Exhs. 34, 44, 60, 61 and 65). In one particular incident a railroad officer took the samples home with him overnight. (See Exh. 34).

**Subsection (L)(2)(C) In S. 561 And Subsection (r)(3)(H)
In H.R. 1208**

According to this section all positive initial tests must "be confirmed by the most scientifically reliable test available." This requirement, as prescribed by the ADAMHA guidelines, is absolutely necessary to ensure accuracy of test results. This should prevent the substantial repercussions from false-positive results. (See Exhs. 44, 49, 52, 66, 68 and 73).

Subsection (L)(2)(C) in S. 561 only requires that the sample be confirmed by a scientifically recognized method of testing, not necessarily the "most" scientifically reliable. The Senate version clearly would create problems of false-positives.

Subsection (r)(3)(J)&(T) In H.R. 1208

This subsection puts a 5-day time limit on the medical review officer for notifying employees of the testing results once he has

verified them. The officer is further required to explain the results and inform the employee of the availability of independent reconfirmation procedures. This will reduce the period of high anxiety, something which all employees who have been tested undergo, until the results are received and they are once again presumed innocent. (See Exhs. 3, 5, 47, 51, 52, 54, 58, 59, 65, 66, 69, 70, 71 and 72). There have been many cases where employees have waited over a month before learning of the test results, and in one instance the carrier waited 104 days before revealing information to the employee concerning the results. (See e.g. Exh. 65). In other cases the test result documents were specifically requested by the employee but these requests were denied. (See Exhs. 44, 51 and 52). As provided by this section it is essential that an individual be given reasonably prompt access to the test results and the supporting documentation thereof. S. 561 is silent on this protection.

Subsection (r)(3)(K)&(N) In H.R. 1208

Each railroad must retain "an independent laboratory, not affiliated directly or indirectly with any rail carrier" and which is certified according to ADAMHA guidelines. This certification may be revoked and labs disqualified for false positive results (subsection (r)(3)(K)), plus any other tests performed at such laboratory within 90 days are subject to reanalysis. (Subsection (r)(3)(N)). This will eliminate the use of unqualified labs by the railroads which continue to be a chronic problem. Currently, there are approximately 1,000 laboratories in the country performing alcohol and drug testing. Of these, only a few have been certified by NIDA. Even labs following adequate guidelines show the lack of foolproof results. In a study

released in January, 1989, by the American Association of Clinical Chemistry, among the 31 laboratories that were investigated, the overall accuracy rate was only 97%. Certification and the independence requirements will eliminate much of the fear and threat of false positive results. (See Exhs. 33, 60, 62, 64 and 72). Again, S. 561 doesn't deal directly with this problem.

Subsection (r)(3)(O) In H.R. 1208

This subsection requires that each employer afford an employee whose confirmation tests are positive, the opportunity to have the result independently confirmed. This is to be at the employee's expense but is subject to reimbursement by the employer if the results are negative. This will give the employee confidence in the final result and will ensure that mistakes made by uninterested parties are exposed. See Exh. 73 where an employee was dismissed based on testing conducted by a company doctor in which there were serious questions as to the integrity of the specimen. (See also, Exh. 44, 76 and 77). S. 561 doesn't afford adequate assurances that the tests will be accurate.

**Subsection (L)(2)(E) Of S. 561 And Subsection (r)(3)(Q)-(S)
In H.R. 1208**

Medical confidentiality is a major concern of the employees. Under FRA's regulations full confidentiality does not exist. The testing allows employers to obtain health information that is not relevant to one's ability to perform work safely. (See e.g. Exhs. 33 and 34). Also, such information can be turned over to police officials.

In this regard, both S. 561 and H.R. 1208 protect the employee by assuring confidentiality.

This confidentiality requirement should be extended to require reasonable confidentiality not only as to the test results, but also the disclosure of testing itself. (See Exhs. 3 and 18). This would prevent announcements in the hospital waiting rooms of certain small towns and small hospitals that individuals are to be tested for drugs. (See Exh. 3). This type of confidentiality breach can lead to social stigma no matter what the results of the tests may be.

Subsection (r)(3)(V) In H.R. 1208

Subsection (r)(3)(V) states that employees who are tested shall be suspended from duty with pay until the results are received; and if an employee is later suspended without pay following a confirmed positive result, they shall be reinstated with back pay if the result of a retest is negative. This provision will ensure that an employee does not lose pay for testing which ultimately turns up negative. (See Exhs. 7, 19, 52, 53, 54, 56, 68, 72 and 73). Long periods of lost earnings can place a substantial hardship on employees especially when it is due to unconfirmed employer suspicion. Employees should not be held responsible for errors by either the carrier or the laboratories. S. 561 does not consider this issue either.

Subsection (r)(3)(W) In H.R. 1208

This subsection provides that no employee shall be tested for alcohol or drugs after 8 hours have passed from the triggering event. This position is absolutely necessary to prevent employer harassment of employees and to ensure that test results reflect the employee's condition at the time of the event. (See Exhs. 3, 24, 39

and 62). In one incident, an employee was required to take a drug test more than 28 hours after the incident and more than 24 hours after the end of his duty. (See Exh. 39). This is totally unacceptable. In another incident an employee was required to remain on duty for 17 hours and 15 minutes because of unnecessary delays prior to the actual testing. (See Exh. 3). Such problem will be corrected by this section. (See also Exhs. 32, 2, 55 and 74). This is not directly dealt with in S. 561. Rather, the FRA rules are incorporated.

Subsection (r)(3)(X) In H.R. 1208

The opportunity for an employee to provide a blood sample, which this section allows, is absolutely necessary. The blood test is the only test which can detect very recent drug usage. Urine tests cannot and may indicate only that a person used drugs up to two months previously. The irony of the random testing program is that an employee could smoke a joint just before going to work and the urine test results would be negative. But a person who smoked weeks before would be positive. Also, random testing will still not deter the common marijuana user. The random testing program may cause those users to convert to harder, more harmful drugs such as heroin and cocaine. These drugs will dissipate from the body within a few days. There is no opportunity for a blood test in S. 561. This is left up to the Secretary.

Subsection (r)(4)(A) In H.R. 1208

There isn't a provision in H.R. 1208 more important than (r)(4)(A) which mandates rehabilitation. The current attitude at the FRA and many railroads is that if an employee tests positive, he is fired and the problem is dumped on some other employer. This

same concept is embodied in S. 561. (See subsection (L)(1)(C) and (D)). Such nonsense does nothing to help the public, the person, or to correct the problem. Operation RedBlock/Stop has adequately demonstrated that programs which include rehabilitation are working very effectively.

Unlike S. 561, H.R. 1208 mandates rehabilitation for one who tests positive. But in addition the employee will be required to serve 40 hours in a community service program directed to alcohol and drug prevention. This imposes a sanction on the employee, yet treats the problem in a humane fashion.

Subsection (r)(5)(O)&(G) In H.R. 1208

An employer who "disciplines, discharges, or discriminates against an employee" on the basis of an unverified positive result, or otherwise fails to administer the drug and alcohol testing as prescribed, may be subject to sanctions. This provision is necessary to ensure that all guidelines and safeguards are followed by the employer, and in assuring the reliability of results. (See Exhs. 6, 8, 39, 65 and 73). Currently, whenever there is an error, misjudgment, harassment tactics or misapplication of the testing regulations, only the employee suffers. When an employer requires a person to be tested 28 hours after the triggering event and threatens the employee with removal from service for insubordination in order to get him to submit to the testing, something must be done. (See Exh. 39). Such blatant disregard for the law and the personal rights of employees is appalling and calls for serious sanctions.

This provision, which makes an employer liable for all deviations from standard procedure, also will put an end to improper

toxicological consent and liability release forms. (See Exhs. 1, 33, 38, 41, 55 and 75). S. 561 doesn't recognize the need to impose sanctions for violations.

Subsection (r)(5)(F) In H.R. 1208

Section 3(r)(5)(F) requires that an employee who attempts to avoid or does avoid testing be subject to penalties unless injury or other urgent circumstances so warrant. This limitation of penalties for refusal to submit to testing is necessary to prevent abuses such as that occurring under the facts of Exh. 6. There, an employee suffering from a traumatic injury and under heavy medication refused testing due to his incoherent state, and as a result was disqualified from service for 9 months. S. 561 is silent on this issue.

CONCLUSION

As can be readily seen, S. 561 is a poor attempt to deal in depth with the alcohol and drug issues. Basically, it passes the buck to the Secretary. If that is the intent of the Committee, then no legislation is needed. The Secretary has already done what he deems appropriate in alcohol and drug testing, and except for a few insignificant issues, S. 561 will not change that. On the other hand, H.R. 1208 is a comprehensive approach at dealing with the entire problem, and is, by far, the best legislation pending concerning testing.

STATEMENT OF FRED A. HARDIN, INTERNATIONAL PRESIDENT, UNITED TRANSPORTATION UNION

Mr. HARDIN. Mr. Chairman, Members, thank you once again for the opportunity to voice my sincere opposition to mandatory random testing. Railroad people are very, very unique, particularly the operating people. I think we are the most unique of all workers in the country.

A railroad employee can be off on an off day Saturday or Sunday, and, for example, hypothetically attend his daughter's wedding and drink one beer. He is called to work because they have a train to move. He has to go or be fired for insubordination. He has had one beer. He is stopped on the way to work. A patrolman says what have you had? I have had one beer. Well, you ran that red light. He gives him a test. He is not impaired whatsoever.

So he drives on to work. They give him a mandatory random testing, and they sentence him to economic, industrial death. There is no impairment, if you get what I mean, just the use.

We have had Rule G for years and years. I am beginning to be reconciled to the fact that some kind of legislation is going to be passed. But I think that it is discriminatory. We have thrown out figures here for months and months, what percent of the people are afflicted or have a problem. Eight percent of the railroad people have a problem; 8 percent of the doctors have a problem; 8 percent of the academics. In every stratum of American society, about 8 percent of the people have a problem. And we think it is discriminatory.

We support—we have spent thousands and thousands of dollars in supporting complete elimination of drugs and alcohol use or abuse in the railroad industry. The Reagan Administration last fall presented my union, me, and CSX Railroad two beautiful plaques for being pioneers; and in the speech the two Secretaries made comments that they only wished other industries would do as much as we had done.

We support pre-employment testing. We support probable cause. We have had probable cause for 50 years. We have never won a case where a railroad officer or a trainmaster or a yardmaster walks up and says to an employee, I think you are drinking. And if he had a witness, we have never won one; in my 47 years of union activity I have never known one that have one on probable cause.

We support after-accident. We support annual physicals. We support physicals after a lengthy absence from work and what not. So we have done everything that we can.

Now, there may be just one chance in a million that we are right about this, that mandatory random testing is discriminatory. And it looks to me like my chances are getting less and less every day. Well, I think that one railroad, CSX Corporation, has spent millions of dollars, and at the present time we have 7,000 employees working on our red block program. I think just in the remotest chance that we are wrong, that we ought to exempt one railroad, and I pick CSX because they are a forward-thinking railroad. They have invested millions of dollars to show that the mandatory random testing—

Now, something happened here today that certainly baffles me and discourages me. I met with Secretary Skinner a couple of weeks ago with three railroad presidents to talk about the situation. Secretary Skinner said today, if I understood it correctly, that he wants FRA or somebody to develop a machine or something that he will have the names of all alcoholics, if that is what I understood him to say. If he wants the names of all alcoholics, he ought to go to alcoholic AA meetings—there are 37 groups around Washington—and meet hundreds and hundreds of alcoholics who have no problem, they are completely sober, dry. So, I really do not understand what he is leading up to. I hope he does not decide he wants a list of golfaholics, or sexaholics, or any other individual recreational choices. But it seems like it is getting a little bit out of hand with the FRA. Now his regulations that he is going to put in, they keep postponing them. There is no impairment; there is no alcohol. Just drugs.

In South Carolina, we never have had a case of drug abuse. That is San Francisco, and Nebraska, and the big cities—St. Louis, we have a lot of them in St. Louis, but we do not have any in South Carolina. So it is a geographical problem.

Well, you know, in South Carolina it used to be you get a half a pint of whiskey if you had some special occasion, and some fried chicken and watermelon, and you thought you were having a big time.

But I think the FRA, now they have postponed for two years any testing on Class II railroads. What in the world is the difference between a Class II and a Class I? I just do not understand it.

But I am sincere that I can show you cases where it has been discriminatory. Now, the gentleman here before said that all management are people of great compassion or whatever, and I am sure he is; but there are some that are not. We had a random testing on one small eastern road last year. They were going to select a name every Monday morning. The local chairman for our union, who happens to be the man who handled the grievances, he won the lottery four Monday mornings in a row. His name was drawn at random four consecutive Mondays. He never had won the state lottery, you know, the million dollar thing, but he won that one every time they had it.

And so I do wish you would give consideration to exempting one railroad, subject to revocation by the committee or the Secretary or whomever, to see if there is a remote chance that our way of rehabilitation is the best.

Thank you.

[The statement follows:]

**STATEMENT OF FRED A. HARDIN, PRESIDENT
UNITED TRANSPORTATION UNION
BEFORE COMMITTEE ON COMMERCE, SCIENCE AND
TRANSPORTATION
UNITED STATES SENATE**

HONORABLE ERNEST F. HOLLINGS, CHAIRMAN

JUNE 15, 1989

We are fully aware of the Committee's support for the practice of random testing of rail workers as set forth in S. 561. We remain unalterably opposed to both the principle and practice of random or no cause testing. In our view it is not only illegal, and ill advised, but will prove incompatible and injurious to our efforts to promote and implement soundly structured Employee Assistance Programs on the railroads. These programs offer rehabilitation to rail families in need and are supported by the education and prevention efforts of our Prevention Teams now actively addressing the twin problems of alcohol and drugs through Operation Red Block.

As often as we have appeared before this and other Congressional Committees, and as often as we have testified before the FRA on the subject of alcohol and drug abuse on the railroads, it seems that we cannot get any serious consideration of our plan to eliminate the use of drugs and/or alcohol in the workplace. The problem exists in every strata of society and in every industry, career or business.

After twenty long and hard years of work, and after expending a tremendous amount of time and money, we have developed a program that is working. We have come up with a program that is saving lives, saving careers and saving money for the railroads. We have come up with a program that is proving to be effective because it emphasizes rehabilitation and prevention instead of discipline.

We have helped develop and implement a program that we believe is better and much more effective than legislation or new FRA regulations. We call it Operation Red Block. Why cripple it with completely unnecessary, unconstitutional and discriminatory legislation.

We appreciate the opportunity to once again voice our opposition to mandatory random testing and the opportunity to explain why we do not even think it is necessary or appropriate.

Now I have a few questions to ask of my own.

You already know or should know about the success of Operation Red Block on the CSXT and other railroads because time and time again we and others have given details about its operation and support. We have asked that railroads with these programs be exempt from new FRA random testing rules and our requests have fallen on deaf ears. You and the FRA have been told by CSXT that FRA's recent decision to impose random drug testing on railroad employees "is not supported by the evidence . . . and is therefore unreasonable." The answer given by government people is that random testing will complement Red Block. We don't believe it. In our view it will destroy the incentive for people to continue as part of Red Block teams.

We want to know how this Committee, the FRA or any other government body can know that Operation Red Block is not a better alternative to random testing without comparing it to some other program. Is there one in Government the equal of what we have on the CSXT? I doubt it.

The Congress, the FRA, and in a few cases some well-meaning but misguided individuals, have put our backs to the wall. We are staking everything we have that Operation Red Block is a much better way of solving the problem of alcohol and drug abuse on the railroads. We recognize the problem, and we have done something about it. We have tried to emphasize the absolute need for a safer work environment. We have backed these efforts with time and money.

Some members of Congress hold stubbornly to the belief that random testing is the only solution. How are we ever going to know unless you exempt those railroads with Operation Red Block for at least one year, and then compare this experience with railroads who don't have voluntary self-help programs like Operation Red Block?

It is important that you know the history of Operation Red Block--a union oriented-management supported program--that grew out of the Railroad Employees Assistance Project (REAP) Study conducted some ten years ago. Operation Red Block is now in place on the CSXT, the Union Pacific, the Burlington Northern and on Amtrak. Other railroads have their own Employee Assistance Programs but for reasons known only to them, they have not embraced the prevention efforts of Operation Red Block.

As of this year, we have about 7,000 trained and active employees on Red Block prevention teams - a volunteer army against alcohol and drug abuse. Where in government can one witness a like effort?

People have put a lot of time and effort into these programs and believe in what they are doing because they see the results of their work. They see the prevented accidents; they see the saved careers, and they believe that railroading is much safer when they know the man or woman working with them is free from the problem of alcohol or drugs. The majority who don't abuse drink or drugs now have the tools to address the problems of the minority in their midst who do.

Random testing will affect the attitudes of the hundreds of dedicated employees on the Prevention Teams and will damage the cooperative spirit that now exists. What effect will it have on the willingness of these people on voluntary Prevention Teams to continue their work? Will legislation help or hinder these efforts? Who is going to take the responsibility for what happens when our programs are destroyed for lack of people support?

We in the railroad industry have come a long way in trying to help one another with this problem and we were doing fine until some government experts stepped in. We wonder what, if anything, has been accomplished by stacking government and carrier rules one upon another. We wonder what will happen if everything we do, every move we make, is somehow subject to Federal regulation. Why are some specific railroad workers going to be treated differently than thousands of other people in the field of

transportation and also thousands of other professional people who hold the lives of people and the future of our country in their hands. The same percentage of doctors, lawyers, judges and all other segments of our society also have drug and/or alcohol abuse problems.

We wonder why we are not being supported in our efforts to use programs that we helped develop and implement to reduce the incidence of alcohol and drug use at no expense to the government.

We wonder why Congress would want to deliberately weaken the ability of our union to deal with this problem in a humanitarian, and sensible, manner.

We want to know how the FRA is going to enforce these proposed laws when it is having trouble putting its own regulations into effect. Evidence of this is the FRA's recent announcement that it was postponing the effective dates of its new rules on Class I, Class II and Class III railroads.

Under the adjusted schedule, all railroads will be required to comply with the "Transportation Workplace Drug Testing Procedures" for existing programs by October 2, 1989 (formerly July 19, 1989), and the new drug-free rule also will be effective October 2 (formerly July 19).

All Class I lines, Amtrak and roads providing commuter service, will be required to submit random testing programs for FRA approval by October 2, 1989 (formerly July 19, 1989) and to implement approved programs no later than January 16, 1990 (formerly November 20, 1989).

Class II carriers will have until April 2, 1990 to file their random testing programs for FRA approval, with startup set for July 2, 1990.

Class III rail lines must submit their programs to the FRA no later than July 2, 1990. One would think that Class III or Class II railroads never have accidents when in fact they have more accidents due to bad track conditions and lack of necessary equipment.

Lastly, we want to know how the Senate, which includes members of this Committee, can sponsor legislation to punish victims of alcohol and drug abuse, yet oppose the inclusion of \$822 million in funding for anti-drug programs.

In concluding my remarks I can only add that our prior efforts to secure short-term exemptions from random testing rules for several railroads with sound Employee Assistance Programs backed by Operation Red Block have been rebuffed. Consequently, we now petition your Committee to support our efforts to secure a one-year exemption from the practice of random testing on one railroad, i.e., CSXT. We deem it not unreasonable to make this request, because conditions on the CSXT provide a fitting opportunity to test our case for Operation Red Block. CSXT has a professionally administered Employee Assistance Program, joint support of labor and management, two thousand trained members of Prevention Teams and a written agreement with our union to deal with the problems of alcohol and drugs in the workplace. What more can you ask of us?

If we prove our case on the CSXT that we can do for ourselves what others cannot do as well - all will benefit. If we can't, you will only have lost one year in the enforcement of your rules. Thank you.

The CHAIRMAN. Thank you, Mr. Mann.

Mr. Hardin.

The CHAIRMAN. Thank you.

Captain Stone.

**STATEMENT OF RICHARD B. STONE, EXECUTIVE CHAIRMAN FOR
AEROMEDICAL RESOURCES, AIR LINE PILOTS ASSOCIATION,
ACCOMPANIED BY GARY GREEN**

Mr. STONE. Thank you.

Good morning, Mr. Chairman and members of the committee. I am Richard Stone, Executive Chairman for Paramedical Resources of the Air Line Pilots Association. I am also an active line pilot, a captain flying the 757 and 767 for Delta Air Lines. With me this morning is Gary Green, our director of our legal department.

The Air Line Pilots Association represents 41,000 professional air line pilots who fly for 47 air lines. We appreciate this opportunity to appear before you to discuss the issue of drug and alcohol testing in your legislation, S. 561.

I have a longer statement for the record, and as you have requested, I will just briefly summarize that statement.

The Air Line Pilots Association continues to work for an alcohol and drug-free cockpit through education and a professional peer intervention program, which now enters its sixteenth year and enjoys a longterm success rate of 93 percent. We believe this type of program is the most cost effective, compassionate, and the least intrusive of the various options for dealing with alcohol or drug abuse.

ALPA and other unions have been criticized by the proponents of the existing regulations in this legislation for opposing drug testing. Let me state for the record again, we do not oppose all forms of testing. We support testing for pre-employment screening, following an accident or incident where there is probable cause, during rehabilitation and post-rehabilitation monitoring. We do, however, categorically oppose random drug testing, and along with nine other air line unions have challenged that in the U.S. Court of Appeals for the Ninth Circuit. We believe that this should be left to the courts to decide and would best be left out of the pending legislation.

Having said that, Mr. Chairman, let me state that if the Congress in its wisdom does believe drug testing legislation must go forward, as the rule it now approaches under the FAA, I would hope that whatever bill you choose to adopt specifically provides for mandatory rehabilitation for all employees testing positive, and spells out the procedural safeguards and precautions which must be taken to ensure that the employees' rights are not violated, and that the results of the tests are, in fact, correct.

As far as rehabilitation is concerned, since Federal workers who test positive must be offered rehabilitation, we believe that private sector employees should be similarly treated. H.R. 1208, the Railroad Drug Abuse Prevention Act, the so-called Luken bill, is a good model here.

In addition, we believe that the extensive procedural protections also contained in H.R. 1208 should be included, in a final bill, one

of these protections, the taking of split urine samples, is essential to protect against mistakes in the laboratories. A number of Federal agencies, including the U.S. Coast Guard, already provide this system. Legislation should also include those provisions of H.R. 33, as introduced by Representative John Dingell, which sets out specific guidelines governing the standards on laboratories performing drug testing in this country. A successful program can only be guaranteed if there is a strict Federal standard.

We also believe that legislation and the resulting regulations should recognize the role of the collective bargaining organization in the creation and administration of an employer's anti-drug program. This point is addressed in more detail in my written statement.

Finally, if legislation and regulations are to be as effective as proponents argue, then they must apply to general aviation as well as commercial aviation. General aviation and commercial aviation share the same air space and the same airports, and a private aircraft that is not operated safely is a direct threat to commercial aviation.

The FAA has acknowledged that the major evidence of drug abuse in aviation has been attributed to the general aviation sector. In that case, Mr. Chairman, there is no reasonable justification for excluding this important sector of the aviation system.

Again, Mr. Chairman, thank you for allowing the Air Line Pilots Association to appear here today; and I would be happy to answer any questions the committee may have.

[The statement follows:]

STATEMENT OF
CAPTAIN RICHARD B. STONE
AIR LINE PILOTS ASSOCIATION
BEFORE THE
COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION
U.S. SENATE
JUNE 15, 1989
DRUG AND ALCOHOL ABUSE
IN THE TRANSPORTATION INDUSTRIES
S. 561

Good morning Mr. Chairman and members of the Committee. I am Richard B. Stone, Executive Chairman for Aeromedical Resources of the Air Line Pilots Association. I am also an active line pilot for Delta Airlines flying the Boeing 767 and 757. The Air Line Pilots Association represents 41,000 professional airline pilots who work for 47 airlines. On behalf of ALPA I appreciate the opportunity to appear at this hearing to address the issue of drug and alcohol use as it relates to the airline industry and to discuss the legislation that you and Senator Danforth have introduced, S. 561.

As we have stated many times before, and before this Committee, the cockpit of a modern jetliner has no room for drugs, alcohol, or any other substances that impair judgement and performance. Airline pilots recognize this. So does the FAA. Its rules forbid the

use of alcohol, illicit drugs, and even some seemingly harmless over-the-counter medicines before getting into the cockpit. Pilots who are alcoholic or drug addicted automatically lose their licenses. ALPA members are fully aware of these rules and support them unflinchingly. Their lives and those of their passengers depend on strict adherence to these principles. Accordingly, maintaining a drug and alcohol free cockpit is of major importance to ALPA.

There is substantial support among experts that the most effective way to eliminate substance abuse in the workplace is by means of Employee Assistance Programs which rely on trained and motivated supervisors and co-workers using the technique of constructive confrontation.

The success of this approach in the airline industry has been demonstrated by the Human Intervention Motivation Study (HIMS) program which has now been in effect for 16 years. This program, initiated by ALPA and operated with the cooperation and support of FAA and the airlines, uses traditional EAP techniques tailored to the specific pilot population. Its principal tools are education, peer intervention, and rehabilitation. The emphasis on peer intervention, rather than the more traditional reliance on supervisors to identify the problem employees, is based on the fact that pilots who work together in the cockpit are best able to observe the performance of their colleagues and to detect any signs of substance abuse. The use of peers also helps to give the program the non-threatening, compassionate character that has

contributed importantly to its success and widespread pilot support.

The HIMS program is managed by professionals with specific training in areas relating to alcoholism and occupational programs. Its implementation depends upon trained volunteer Human Intervention Committees (HICS) made up of union and management pilots at each participating airline. These pilots know how to identify the signs of alcoholism or drug abuse, and when they find them they "intervene" to induce the victim to disclose his problem and seek rehabilitation. The intervention takes place at a meeting, carefully arranged in advance without the pilot's knowledge, in which the pilot is confronted by his co-worker, his family, a representative of the airline (usually the chief pilot) and a physician, and urged to face his problem and accept treatment. Of course, once the problem becomes known the pilot must give up his medical certificate, but if he successfully completes rehabilitation--as the vast majority do--he is able to regain his certificate and resume flying, while being carefully monitored for at least two years by trained, FAA physicians, pilots, and flight managers. In the meantime, the program protects the flying public and promotes air safety by removing alcoholics and drug abusers from the cockpit.

Since the inception of the program, some 800 pilots have undergone rehabilitation for alcoholism, and the long-term success rate of the program has been 93 percent. Because of this high rate of success, the program enjoys a high level of confidence among all pilots and it has become increasingly easy to persuade those pilots who have a

drinking problem to seek help.

The HIMS program works because it is compassionate and nonpunitive, because it is implemented by the pilots themselves, because it puts management, labor, and government into a cooperative rather than an antagonistic relationship, and because it emphasizes education and rehabilitation rather than testing and enforcement.

Although the program has focused primarily upon alcoholism--which is by far the greater substance abuse problem both in society at large and among pilots--it has been expanded to deal with drug abuse as well. Indeed, in November 1987 a HIMS training program co-sponsored by ALPA and the FAA dealt primarily with drug abuse.

The Department of Transportation, in its justification for issuing regulations requiring drug testing cite that the Coast Guard experimented with a voluntary disclosure and rehabilitation program from 1980 to 1982 but concluded that it was ineffective and therefore introduced mandatory universal drug-testing. We do not know why the Coast Guard program failed, but the success of the HIMS program indicates that a properly run EAP can be very successful. The different results of these two programs may be accounted for by demographic difference--age, education, income--between the two groups involved, and also the vast difference in the incidence of drug abuse in the two groups. Also, the Coast Guard program was imposed from the top, while the HIMS program was initiated by the pilots themselves. Moreover, the

HIMS program involves substantial pilot participation, which was not true of the Coast Guard program.

Whatever the explanation for the Coast Guard's experience, the success of the HIMS program is clear and undeniable. Before something as constitutionally suspect, hugely expensive, and of such doubtful value as random drug testing is tried, the industry should be permitted to continue to utilize the HIMS approach to the drug and alcohol abuse problem.

ALPA has learned from the HIMS program that the only truly effective and permanent solution to the problem of substance abuse is education and rehabilitation. Identification of drug abusers by testing or other means is of little value if the drug abuser, once identified, is not rehabilitated. Simply to remove such a person from a safety-related job is no long-term solution, because sooner or later he will end up in some other job or situation where he can cause harm to himself or to others. If forced out of the job market entirely, such a person is likely to turn to crime. Thus, some form of rehabilitation is essential--not only for the sake of the employee but for the sake of society.

Some have argued that rehabilitation at a maximum should only be made available to those who come forward voluntarily. There is no valid reason for this position. The experience of the HIMS program has been that only 15 percent of the cases processed have been self-

referred, 85 percent were discovered by either the union or management, or both.

It is reasonable to assume that the level of self-referral by drug abusers would not differ significantly from what we have experienced with alcoholics. Thus, limiting access to the rehabilitation program to those who come forward voluntarily would mean that most of the employees who need rehabilitation would not be eligible for it.

There is no scientific evidence that persons who come forward voluntarily are any better candidates for rehabilitation than those whose drug-abuse problem is uncovered through testing or other means of detection. The experience of the HIMS program has been that there is no difference in the rate of rehabilitation between these two groups.

ALPA and other unions have been criticized by proponents of the existing regulations and this legislation for opposing drug testing. Let me state for the record again, we do not oppose all forms of testing. We support testing for pre-employment screening; after an accident or an incident; where there is probable cause; and during rehabilitation and post-rehabilitation monitoring. We do, however, categorically oppose random drug testing and along with 9 other airline unions have challenged that in the U.S. Court of Appeals for the 9th Circuit. We believe that matter should be left to the courts to decide and would be best left out of the pending legislation.

Having said that Mr. Chairman, let me state that if the Congress in its wisdom does believe that drug testing legislation must go forward I would hope that whatever bill you choose to adopt, specifically provides for mandatory rehabilitation for all employees testing positive and spells out the procedural safeguards and precautions which must be taken to ensure that the employees rights are not violated and that the results of the test are in fact correct. Federal workers who test positive must be offered rehabilitation and we believe that workers in the private sector should be similarly treated.

Since I have previously addressed the need for mandatory rehabilitation, let me now discuss what procedural protections are needed. ALPA applauds the fact that S. 561 requires that the Administrator must incorporate the Department of Health and Human Service scientific and technical guidelines in the development of its regulations, but we believe that further protections such as those contained in H.R. 1208, the Railroad Drug Abuse Prevention Act of 1989, the so-called "Luken Bill", should be included in the final product. Legislation should also include those provisions of H.R. 33, as introduced by Representative John Dingell (D-MI) which sets out specific guidelines governing the standards of labs performing drug testing in this country. A successful program can only be guaranteed if there is a strict federal standard.

Furthermore, we believe that two additional steps are needed

to safeguard the employee from any wrongful action. They are: 1) the preservation of the role of collective bargaining in the creation and administration of each employer's antidrug program, and 2) the taking of split urine samples.

S. 561 and the DOT/FAA regulations are silent on the role to be performed by labor organizations in the creation and administration of the antidrug programs and the EAPS which they call for. While this matter is governed by the federal labor laws, not the FAA, legislation and the subsequent regulations should be made explicit that they do not override the federal labor laws governing collective bargaining. This would eliminate any possible dispute as to whether employers are required to bargain collectively with the designated representatives of their employees concerning those matters which the regulation leaves to employer decision-making.

For example, the current regulation would require each employer to adopt a drug-testing plan that meets certain prescribed criteria, but within the limits set by those criteria the employer would have wide latitude in the design of the plan. We believe, that, under the Railway Labor Act (as well as the National Labor Relations Act, in those cases where it applies), the employer would be required to bargain with any duly designated collective bargaining representative of the affected employees concerning the details of the plan, such as the number and location of collection sites, the procedures to be used for selecting employees for random testing (assuming random testing is

ultimately required), the selection of the laboratory that will perform the test, the union's role in the inspection of the laboratory, how employees will be notified of their tests, how they will be compensated for the time spent in the testing process, what procedures will be available to employees who wish to challenge a test result, and any other such issues.

Aside from the design of the drug-testing program and any EAP, unions have a right to be kept informed about the day-to-day administration of these programs, to propose changes when they see deficiencies, and to invoke the applicable grievance and arbitration procedure as to any dispute concerning the operation of the programs. One major function of a union, of course, will be to assist any employee who wishes to challenge a positive test result or an employer action based on that result.

The experience of the HIMS program demonstrates that a union can play a leading role in the development and administration of a substance-abuse program, and contribute in a major way to the success of that program. The bill before us and the regulations, reflect no recognition of that fact--indeed, they say nothing whatever about the role of unions or collective bargaining in the area of drug testing and rehabilitation. We do not ask that the FAA be required to define precisely what the unions' role should be--in fact, this is a subject outside the jurisdiction and competence of FAA. It is important, however, that FAA make clear, in any regulation it issues, that it is

aware that unions have collective bargaining rights under federal labor laws, and that the regulation in no way interferes with those rights.

With regard to split samples, we believe this to be essential because one sample can be preserved as a control in case any question should arise as to misidentification of the sample that is sent forward for analysis. There is nearly universal consensus in the drug testing field that split samples are an absolutely essential safeguard. The HHS guidelines do not address this, and claim that its labeling and chain-of-custody procedures eliminate all risk of mislabeling or sample mix-up, but that is only true if no mistakes are ever made in the implementation of those procedures. No procedure can absolutely guarantee that there will be no labeling or chain of custody errors made in a testing program of the magnitude your legislation envisions. Split samples are the only method by which such errors can be caught. I am sure you are all aware, that the Coast Guard program, which DOT repeatedly refers to in justifying their regulations, uses split samples.

I would also like to say Mr. Chairman that if there is to be mandatory drug testing, ALPA believes it is important from the point of view of both fairness and effectiveness that the program apply to top management, whose action or decisions could impair safety.

Certainly, in our society, drug and alcohol abuse is not unknown among business executives, from CEO's down, and it is clear that

management decisions relating to scheduling, maintenance, and the like could seriously compromise air safety. Furthermore, it is highly important for employee morale and acceptance of the total program that the program not appear to exempt higher management. Executives of all Federal Agencies with drug testing programs, participate in mandatory testing, likewise we feel this important aspect should be applied in the private sector.

Finally, if legislation and regulations are to be an effective as proponents argue, then they must apply to general aviation as well as commercial aviation. FAA in issuing its NPRM in 1988, stated that general aviation operations were excluded because they are not subject to "the same degree of public trust" as commercial operations. General Aviation and commercial aviation share the same air space and the same airports, and a private aircraft that is not operated safely is a direct threat to commercial aviation. FAA has acknowledged that "the major evidence of drug abuse in aviation has been attributed to the general aviation sector". In that case, Mr. Chairman, there is no reasonable justification for excluding this important sector of the aviation system.

Again, Mr. Chairman, thank you for allowing ALPA to appear there today and I would be happy to answer any questions the Committee may have.

Mr. CHAIRMAN. Very good.
Mr. Langrebe.

**STATEMENT OF KARL M. LANDGREBE, SPECIAL ASSISTANT TO
THE PRESIDENT, NATIONAL MARINE ENGINEERS BENEFICIAL
ASSOCIATION**

Mr. LANDGREBE. Mr. Chairman, I am pleased to testify today on behalf of the National Marine Engineers Beneficial Association, our oldest and largest maritime union.

We share our Nation's concern about the drug problem which has plagued American society and nations around the world. As representatives of thousands of merchant mariners on U.S. flag vessels plying our Nation's domestic waterways and sea lanes of the world, we are committed to the highest standards of safety and to a drug-free working environment.

This has been and always will be our position. Drugs and maritime work simply do not mix, and the same is true for alcohol.

Mr. Chairman, as you know, the Coast Guard and the Department of Transportation have put in place extensive regulations for drug testing of merchant seamen. These regulations impose pre-employment and periodic testing as of June the 21st, and random testing and post-accident, after December the 21st.

I should note that long before these regulations were adopted, we got together with our companies and negotiated how they should be implemented. And even before that, our union had agreed with its companies independently on a comprehensive and far less costly drug testing program.

I should note that when the Coast Guard and the DOT originally proposed their regulations, they gave no empirical evidence that there was a serious drug problem in the U.S. flag fleet. Instead, the statistics they cited lumped together all types of vessels, U.S. and foreign, and most of the incidents involved small pleasurecraft.

Mr. Chairman, while we have problems with certain aspects of the Coast Guard/Department of Transportation program, which I will mention shortly, we do not commend at this point applying a new set of standards. Instead, if S. 561 includes maritime, then it ought to incorporate the DOT/Coast Guard program now underway, with two major suggested changes.

The first deficiency of the Coast Guard regs concerns their applicability. They apply only to U.S. flag vessels. This is not only unsafe but unfair. Currently, some 96 percent of America's exports and imports are carried on foreign flag vessels yet these are entirely free of the Coast Guard drug testing program. This is as illogical as if drug testing for other industries were applied to only a fraction of their participants—four out of every 100 trucks, four out of every 100 trains, four out of every 100 747s, and so forth.

If safety is the objective of these regulations, then to exclude 96 percent of the universe totally emasculates the regulations. Many foreign flag vessels carry highly toxic cargoes. For example, an accident involving liquefied natural gas could be devastating if it occurred near a major city such as New Orleans or Boston. In addition, these regulations leave untouched the massive foreign flag

cruise industry that operates from American ports, carrying hundreds of thousands of Americans every year.

There is also the question of fairness. The U.S. flag fleet is already the safest in the world. We are under heavy economic pressure from foreign flag competitors; yet our industry is told to accept and pay for an expensive drug program costing millions, while foreign flag competitors do not have to pay a penny.

In addition, it is also unfair because of the legal liabilities which would be imposed on the U.S. flag industry in the event of an accident with a foreign flag vessel. Only the U.S. mariner would be subject to drug and alcohol testing.

Mr. Chairman, there is a solution. Simply apply drug and alcohol regulations to all vessels in U.S. waters or entering U.S. ports. I note that S. 561 clearly applies to foreign air carriers. If this can apply to the air line industry, why not to maritime?

If there is any doubt as to the advisability of this recommendation, I would like to introduce for the record a March 17, 1989 memorandum of Chung Hal Ship Management Company, Limited that shows the slop chest price for alcohol sold aboard ship, a foreign flag ship. On one hand we are subjecting American mariners to intrusive and comprehensive tests, while on the other hand, foreign flag carriers are allowed to sail in and out of our harbors while selling liquor to crew members at discount prices. This is not an uncommon practice. We simply must apply drug and alcohol regulations to all vessels, not just American vessels.

Our second problem with the Coast Guard concerns rehabilitation. In the proposed Coast Guard regulations there was a provision for a comprehensive rehabilitation program; in the final regulations, nothing.

Rehabilitation is fundamental. Individual must know there is a way out. Not only do they have valuable skills worth saving, but they are human beings with families worth saving. If there is rehabilitation, an individual is more likely to admit there is a problem, as will others in the crew be more likely to encourage the individual to seek help.

In this connection, I note that S. 561, in essence, bans an individual from performing their job ever again. This, we believe, is the wrong approach. It won't encourage an individual to turn himself or herself in nor will it encourage others to report problems they observe. It will hide problems rather than solve them.

The objective, after all, is not a body count of offenders, but rather a drug and alcohol-free industry. And we believe that the best way to achieve this is to encourage those with problems to seek help rather than to destroy their lives with no hope of rehabilitation.

Mr. Chairman, that concludes my statement. I would be happy to answer any questions.

The CHAIRMAN. Mr. O'Connell.

STATEMENT OF K. MICHAEL O'CONNELL, COUNSEL, OWNER-OPERATORS INDEPENDENT DRIVERS ASSOCIATION OF AMERICA

Mr. O'CONNELL. Thank you, Mr. Chairman.

My name is Michael O'Connell, and I am here today on behalf of the Nation's more than 350,000 independent truck owner-operators.

The proposed legislation that this Committee is considering goes far beyond any necessary or constitutionally permissible means for dealing with drug use in the trucking industry. There is no reliable evidence demonstrating a problem in the trucking industry with drug use, and general concerns do not justify the wholesale invasion of the rights of drivers that would be wrought by this legislation through random testing.

Most importantly, as you consider this legislation, OOIDA urges you to consider that millions of innocent drivers will be victimized by its provisions. Drug testing—

Senator DANFORTH. Victimized?

Mr. O'CONNELL. Victimized, Senator. Drug testing assumes the guilt of the individual based upon their occupation. There has been much talk today about drug testing. It is an interesting euphemism. "Testing" is humiliating.

The existing regulations of the Department of Transportation requires a driver to be accompanied by a monitor to a collection site. Blue water is placed in the toilet tank and the toilet bowl so that the specimen cannot be tampered with. The person has no access to water, soap, or anything else while they are in the collection facility. The driver must remove outer garments. The monitor listens to the person urinate and listens for unusual activity with his ear pressed to the door. And this is under existing regulation, Senator.

The monitor checks the temperature of the urine when the urine is taken from the collection site, and if the temperature falls outside of a certain range, the monitor is then authorized to collect another sample. This time, it is observed. If the monitor suspects any unusual activity, in his or her discretion, that activity can trigger also the collection of an observed sample.

Truck drivers are not hardened criminals. They are not known drug users. And drivers who are not even suspected of using drugs—indeed, many drivers that are not suspected of using drugs—will be tested based solely on their occupation.

OOIDA has summarized in its written comments the typical owner-operator. He or she is a stable, 10-year resident of his community, married, has children, and has been in trucking for a number of years. We are fortunate, Senator, to have one such person with us today, and I would ask her to stand. I would like to introduce Sandy Craig. Sandy and her husband, Rick, are owner-operators. They are small businesspersons. They do not use drugs. They are from Anderson, Indiana, and the two of them operate their truck together as a family business. They are the type of people that will be adversely affected by this legislation.

Many drivers, who have been of the different regulations that have been passed in the several years, have been saying "enough". Who would subject themselves to the procedure that I just described in order to have the privilege of staying away from their home for 300 or more days per year and earning \$16,000 to \$20,000?

There are several other proposals not before the committee that are compounding that problem; that of black boxes, premised on the notion that drivers will dishonestly report hours of service. Ret-

inal imaging, scanning the retina of the drivers eyes, because it is assumed that the driver will obtain a fraudulent driver's license. And drug testing.

People like Sandy are saying enough, and they are leaving the trucking industry in large numbers. As they leave, they are creating the driver shortage that you are hearing about. Drug users are not leaving the industry, because they do not feel that this type of testing is an indignity. They are honing the skills necessary to defeat the test.

Much talk has been made here of the military drug testing program. The military drug testing program is often referred to as an "IQ test." Those persons that get caught are generally not considered smart enough to defeat it. Those hardened drug users that are in the transportation industry will also defeat those tests.

The replacements for the seasoned drivers, and the people like Sandy—the solid citizens that have said "enough, we will not take it any more", are poorly educated and inexperienced. Many people in the trucking industry today are calling for 18-year old drivers to solve the driver shortage. This group has historically been the most, the largest safety risk on the road, and as drivers of commercial vehicles, they will likely spell disaster.

We urge the committee to drop the random testing provisions, indeed the entire bill.

Thank you.

[The statement follows:]

BEFORE THE
UNITED STATES SENATE
COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION

STATEMENT OF THE OWNER-OPERATORS INDEPENDENT DRIVERS
ASSOCIATION OF AMERICA, INC.

Hearing on
S.561

K. MICHAEL O'CONNELL
Counsel

June 15, 1989

Mr. Chairman, Committee members, Committee staff, my name is Michael O'Connell and I am counsel to the Owner-Operators Independent Drivers Association of America, Inc. ("OOIDA" or "Association"). OOIDA is the national trade association representing the interests of the nation's more than 350,000 independent truck owner-operators. Owner-operators are small business men and women who own and operate individual class 7 and 8 trucks and small truck fleets.

Collectively, owner-operators are responsible for approximately 40% of the intercity truck traffic in the United States. They engage in the transportation of commodities exempt from the regulations of the Interstate Commerce Commission ("ICC") or lease their equipment and services to private and for-hire motor carriers. As

small business men and women who operate an average of more than 90,000 miles per year and spend in excess of 300 days per year on the highway, owner-operators are most directly affected by any safety implications flowing from drug use on the nation's highways. Truck drivers are also, by far, the largest group that will be tested if the proposed legislation passes, representing approximately 3 million of the 4 million affected workers.

OIDA has long supported constitutionally sound efforts by the Congress and the Secretary of Transportation to make America's highways as safe as possible, and will support reasonable means for eliminating drug use -- as long as those measures are within the bounds of the Constitution. The proposed legislation, however, goes far beyond what is constitutionally permissible and, in fact, seeks to address a problem that does not exist. There is no need for federally-mandated drug testing in the truck transportation industry.

There is no reliable evidence demonstrating an extraordinary drug abuse problem in the truck transportation industry. Indeed, the only statistically reliable data regarding drug use among truck drivers indicates that it is virtually non-existent.^{1/} The fact that the public has a general concern with drug abuse in society at large does not justify a wholesale invasion of the constitutional rights of 3 million truck drivers. When the record of the recent DOT rulemaking establishing mandatory drug testing regulations was reviewed in court, the U.S. District Court concluded:

^{1/} The only reliable data regarding drug use among a statistically significant sample of truck drivers comes from the experience of the International Brotherhood of Teamsters, with drug testing conducted pursuant to the terms of the National Master Freight Agreement ("NMFA"). That Agreement provides for testing of specific workers, under controlled circumstances, with defined testing levels, and an accurate confirmation test. The sensitivity levels and the testing procedures contained in the NMFA closely parallel the regulations that have been issued by the U.S. Department of Transportation. The testing of more than 25,000 in service truck drivers under the provisions of the NMFA revealed that less than 0.2 percent of those drivers tested positive for drug use.

While the court shares the government's concern with eliminating drug usage, rhetoric alone cannot serve as the basis for the invasion of constitutionally protected rights. ^{2/}

Employers and law enforcement officials already have the authority to test any driver for drugs and alcohol when there is probable cause to believe that the driver is operating the vehicle under the influence of such substances. In enacting mandatory testing based solely on an occupational classification, the Congress attempts to substitute its judgment that all drivers are suspect for the judgment of those closest to any problem.

Truck drivers are closely scrutinized by law enforcement personnel. Drivers come in contact with enforcement officers at truck inspection points, weigh stations, and ports of entry. A single truck safety inspection takes 30-45 minutes. During the inspection, the driver and the officer interact and discuss vehicle condition, hours-of-service, and details of the transportation movement. If the inspection officer has reason to believe (based on observation) that the driver is impaired for any reason, he or she already has complete authority to require testing. Drivers also interact with enforcement personnel at truck weigh stations. On a typical trip from Kansas City, Missouri to New York City, a truck will stop, on average, at ten different scales. At each of these checkpoints, enforcement personnel have an opportunity to observe the behavior of the driver and to order testing if there is a particular reason to do so. Random testing that tests 50 percent of all drivers per year is a poor substitute for these multiple observations by enforcement officers.

Following an accident, law enforcement officials have the power to order the drug testing of any driver involved in the accident. Mandatory post-accident testing of only the commercial vehicle driver will create enormous liabilities for truck operating

^{2/} Owner-Operators Independent Drivers Association of America, Inc. v. Burnley, 705 F. Supp. 481, 485 (N.D. Cal. 1989).

companies and, potentially, for the insurance industry. While current test procedures have the ability to identify drug use, they lack the sophistication to identify impairment on the part of the driver. With existing testing procedures, "drug use" can be identified for up to 28 days; however, "use" may have no relationship to impairment. By mandating drug testing for the commercial vehicle driver, a record of any drug use is firmly established for future litigation, while there is no corresponding requirement that the driver of the other vehicle be tested. This is particularly unfair given the findings of a University of Michigan study that the other driver is statistically three times as likely to be at fault in the accident, and statistically more likely to be under the influence of drugs or alcohol.

While the Association takes sharp exception to the proposed legislation and will challenge it in court if enacted, it is in complete agreement with its intent -- if its intent is to eliminate drug- and alcohol-impaired drivers. On the average, owner-operators drive more than 90,000 miles per year and spend more than 300 days per year on the highway. There is no group that has a stronger stake in highway safety. While they have a strong stake in highway safety, owner-operators justifiably oppose the violation of their constitutional rights, and have demonstrated their objection by obtaining an injunction against the Department of Transportation regulations.

WE MUST NOT BEND THE CONSTITUTION TO DEAL WITH THE "DRUG PROBLEM"

To be sure, the "drug problem" has become an important national issue. It has an impact, in one way or another, on every occupation. There is justifiable frustration over the inability of current efforts to stem the problem. However, in the zeal to combat drug abuse in American society (and in the transportation sector) we should not lose sight of the fact that our laws are based on a system of individual rights and presumed innocence. The proposed legislation is a radical departure from established legal tradition in both of these fundamental principles. Millions of drivers who have not

used drugs, and never will, will be forced to prove their innocence by engaging in humiliating urine tests as the price of continuing in their chosen occupation.

The proposed legislation requires the protection of "individual privacy in the collection of specimen samples." The U.S. Department of Transportation has already issued regulations regarding the collection of urine for analysis. It would be difficult to conceive of a more intrusive or humiliating procedure.

Under existing regulations a driver must proceed to a designated private site or a restroom stall accompanied by a collection site monitor. Upon entering the restroom, the driver must remove any clothing that might conceal items or substances that could be used to tamper with the specimen. The driver must then wash his or her hands before urinating, and remain in the restroom or collection site throughout the collection process. During this period, the driver will be denied any further access to water fountains, faucets, soap dispensers, and cleaning agents. The collection site monitor must place "bluing" agents in the tank water and bowl of the toilet that the driver will use. The collection site monitor then remains close by, listens to the urination, and notes any "unusual behavior" while the driver is urinating. The monitor can, in certain circumstances, insist upon visually observing the urination.

The driver is instructed not to flush the toilet until the urine specimen is turned over to the collection site monitor. As soon as the driver hands over the specimen, the monitor also measures the temperature of the urine, and inspects it for signs of contaminants. If the temperature falls outside an established range, the driver must urinate once more to provide another specimen, this time under direct observation. When the monitor has reason to believe that a driver has tampered or may tamper with the specimen, he or she may, once again, require that individual to urinate, but this time under direct visual observation. I doubt that there is a person in this room who would feel dignified while submitting to this procedure.

This procedure is not being required of hardened criminals, known drug abusers, or even persons who are for some reason suspected of using drugs. It is required solely on the basis of occupation. This Committee should understand who will be tested in this manner.

A profile of owner-operators reveals that more than 83% of owner-operators are married; more than 54% have children living at home; approximately 29% drive with their wives (either occasionally or full-time); and 45% have served their country in the military. Over three-fourths of them have graduated from high school, and more than 22% of the graduates have some form of higher education. They tend to be very stable residents of their communities, with more than 72% having the same residence for more than 10 years. These are anything but high-risk candidates for drug use. They should not be subjected to the humiliating procedure previously described in order to prove that they are innocent when there is no reason to believe they have done anything wrong.

The lives of truck drivers are difficult. They spend more than 300 days per year away from home, are faced with an increasingly complex set of federal regulations, and earn an average of \$20,000 per year for these efforts. They face a web of conflicting state requirements in the areas of vehicle safety, registration, taxation, and regulation. Add to this the indignity of requiring them to establish their innocence through a humiliating urine test when there is no reason to require them to do so, and many are saying, "Enough!"

Even beneficial "miracle drug" cures can kill the patient if overdoses are given. The unyielding proliferation of new regulations and enforcement activities have already reached overdose levels for many. This additional and outrageous intrusion will be the "last straw" for many. Members of OOIDA who have never, and will never, use drugs tell the Association that rather than submit to yet another indignity, they will leave the industry. Ironically, those drivers who are irresponsible enough to use drugs in the commercial vehicle workplace will not feel the indignity and exit the industry;

rather, they will continue as drivers and hone the techniques necessary to defeat the testing procedures.

The trucking industry is already experiencing a deepening shortage of drivers. As more and more experienced drivers exit the industry, they will be replaced with less experienced and likely less stable entry-level drivers. In response to the driver shortage, the trucking industry is already attempting to obtain permission to use 18 and 19 year old drivers. While the experience with this group in the trucking industry is obviously untested, these drivers have been historically documented to be the least safe of all age groups and most likely to actually use drugs. To drive responsible, seasoned and professional drivers out of the industry through harassment masquerading as safety only to replace them with immature and inexperienced 18 year olds will create a far greater safety problem than drug testing will allegedly solve.

In conclusion, OOIDA urges the Committee to abandon this legislation. The alleged problem that it seeks to address has no basis in fact. Further, the legislation is an affront to the integrity and perverts the Constitutional rights of 3 million truck drivers. Lastly, the authority to remove impaired drivers from the highway already exists through constitutionally sound means.

Thank you for the opportunity to present the views of independent truck owner-operators.

The CHAIRMAN. Well, of course, you can tell by the authorship and the strong support given our bill for random testing that we do not think it is humiliating. We think that we are doing what you talk about making sure that the skills to defeat the test, as you expressed it, are not employed.

You call it on the one hand humiliating, and then you tell the need for listening at the door in a second test and taking the temperature of the urine and everything else like that; that is, the skills to defeat the test. So, as a practical matter, those are necessary, and they are not leaving the trucking industry.

We are trying to make those highways safe for Sandy. It is a public problem, a national problem, and the Congress and all of us have recognized it as such. And we are determined to make these highways as safe as we possibly can.

Now, Mr. Hardin, you are very attractive and interesting, but you do not give us the one bell test, and let one railroad go, and that will defeat the bill. One fellow says wait for the court to test, do not legislate. The other one says if you do legislate, put an unconstitutional provision in there for one railroad to make sure it will not go anywhere.

So, let me ask since you are getting all of these awards, there have been nine drug related accidents this year according to the Federal Railroad Administration. Seven involved railroads with Red Block in place, including the group that is getting all the awards.

In the light of that record so far this year I do not know what they are getting their awards for, but the random testing, I think, would correct that. I think it would improve upon the award and improve upon the program that they have, do you not?

Mr. HARDIN. Well, you know numbers.

Let me digress just one moment, Mr. Chairman. The Chase, Maryland wreck was a terrible tragedy. I deeply sympathize with Dr. Horn and Mr. Johnson, but—and I can empathize with them. I have lost family members in train wrecks, and we are terribly sorry about Mr. Gates who, as a result of his testimony—as the president of the largest rail union, I have done a lot of investigating. No railroad will agree with his testimony nor neither will I about people bringing a case of beer to work and drinking every day. That is absolutely erroneous statements.

But, the point I want to make is that Ricky Gates could have had a seizure or he could have had a heart attack as he was traversing that adjacent track. One year before that disaster the railroad removed a derailing device because it cost \$50 a year to keep it oiled and up.

Now, we are not making excuses for Ricky Gates, but the railroads have some responsibility. A derailing device that would have derailed that engine that would have never gotten out on that main line. But the railroad removed it because of a \$50-\$100 a year maintenance cost.

So, there are a lot of problems for accidents, and the ones you talk about, I am not familiar with them, but we are going to continue to have accidents. But the only reason—we have had three—we have only had three railroads, UP, CSX, and Burlington Northern, who have workable, reasonable rehabilitation programs, and it may be that we have had some minor incidents on B&O or part of the CSX, but truthfully this morning I am not familiar with them. But I do know that the program is working and it is, you know, like several people have said, we want to catch everybody. Well, we do not want to catch anybody that has not done anything.

I would like to see that the mandatory random testing, if it goes into effect, does not catch but three or four people. I would like to see that. Then I am sure you would, too, because we want to eliminate it. But I do not see any problem with allowing one railroad that has invested millions and millions of dollars into a program that we have invested hundreds of thousands in just on the bare chance that we could be wrong.

The CHAIRMAN. Mr. Mann, with respect to the rehabilitation, is the employee entitled to pay during that time?

Mr. MANN. No, sir, not if they are caught with a positive test. Under the House bill, Mr. Chairman, if one goes into a voluntary program, rather than caught and tested positive, for one year he has an opportunity to seek rehabilitation and to receive pay. But nowhere else in that legislation does it provide for pay.

The CHAIRMAN. So, that is voluntarily submitting to the rehabilitation program itself?

Mr. MANN. Yes, sir.

Senator EXON. Mr. Chairman, would you yield.

The CHAIRMAN. Yes.

Senator EXON. Thank you for asking that question, Mr. Chairman, and thank you for your response. Let us make this crystal clear now. What you are talking about is in the House bill. Then I assume you are suggesting we take a look at. It would not affect basically what we are doing with our bill except that if someone voluntarily comes forth before they are caught with random testing and says look, I think I have a problem, I would like to appeal for rehabilitation, in that case and in that case only would the rehabilitation rules and "outs" apply, is that correct?

Mr. MANN. That is correct, Senator.

Senator EXON. Now, for an employee who was caught, on the other hand, by the random testing, that option would not be available?

Mr. MANN. That is correct.

Senator EXON. Thank you.

The CHAIRMAN. I am going to yield in just a second but, Mr. Landgrebe, the captain or skipper of the *Exxon Valdez*, is he a member of your group?

Mr. LANDGREBE. No, sir, he was not.

Senator EXON. That is Exxon.

The CHAIRMAN. In other words, they have their own private organization of pilots and masters?

Mr. LANDGREBE. They had an unlicensed association. They had disbanded their officers association some years prior to that. There is no association.

The CHAIRMAN. Well, as you indicate, we can obtain jurisdiction when they get into American waters. Well, let me ask with respect to the maritime, other than that one up there, what is the incidence of maritime accidents involving drugs or alcohol of which we are aware?

Mr. LANDGREBE. We know of none deep sea. When the Coast Guard finally released on a Freedom of Information Act request what they based their statistics on, I believe there were 37 that had drug or alcohol-related incidents listed as a probable cause, and all but two of them were pleasure boats. They were just plain old citizens. They were not commercial vessels at all, and I believe the other two could have been fishing vessels. I just do not remember at this time.

We have at this time started prior to the regulations being mandatory on June the 21st, as I said in my testimony, we have started a drug testing program in our industry, and so far of the 500 plus officers who have been tested in my organization, we have not had one positive.

I believe the incidence is very low. However, we are not saying do not do it. We think it will prove itself out. What we are saying is do it to every vessel that enters our waters regardless of what their flag is and only then do you have a safe harbor and a safe working environment.

The CHAIRMAN. And, Captain Stone, in the airlines, the industry itself declined to testify. But with the pilots, what is your knowledge with respect to airline accidents involving drugs and alcohol?

Mr. STONE. Well, there has never been a scheduled air carrier that has had an accident when alcohol and drugs were involved.

The CHAIRMAN. How about the Continental?

Mr. STONE. Well, the Durango accident was the first one where cocaine was involved and, of course, that particular group of pilots was not a part of our association nor did they have any kind of an employee assistance program.

But, unfortunately, if you dig at that accident real well as a former accident investigator, I will tell you that there were a lot of things that operated inside that accident that have been present in many of the commuter air carrier accidents before, and while I in my association abhors the use by any pilot of any drug or alcohol that influences his behavior in a cockpit, I will tell you that there are numerous causes of that accident that were poorly investigated, but I am afraid that many people use that as an example, which is a very poor example.

The CHAIRMAN. Well, what about random testing now? You say you oppose it and yet I would think that the pilots themselves are subjected to more intense and careful physicals and more constant physicals than any other group in this panel here involving other lines of transportation.

It seems to me that the pilots themselves, the crews and everybody else involved would be interested in random testing rather than opposing it. What is wrong with it?

Mr. STONE. Well, I think most of the membership—and there is a group of our members who are for testing, even random testing because they want to stand up and prove that they are drug-free—but there are a whole group of pilots also that are very worried about the fact that it becomes in the hands of a laboratory technician, my job, my livelihood, and that becomes very troublesome.

And we suspect—and you can see it scientifically—whenever you increase the number of tests, you increase the error rate.

And while people will come before my group of pilots and say well, there is less than $\frac{1}{2}$ of 1 percent of you that there would be an error on, they say a half of 1 percent, that is like 200 pilots we are going to lose who are going to lose their jobs improperly.

And so we understand the legislation or the rule itself is there now, and we will be testing them randomly starting the first of the year. I think what we are trying to do is to deal with our own carriers and provide the protections for our members and do it in a way that takes the testing forward.

We think it is going to be a very poor result of the testing and it is going to cause our air carriers, our employees a lot of money. It is going to be a program that does not produce much because there is no evidence that I can see in our industry that there is use of drugs or misuse of alcohol.

The CHAIRMAN. Senator Exon.

Senator EXON. Mr. Chairman, thank you very much.

Gentlemen, I appreciate your coming here this morning, and I know that you speak very sincerely for your membership.

Those of us on this side of the table are trying to drive home, as I have tried to time and time and time again that we are soliciting the help of industry, of workers, to attack this drug problem. I think it is a threat to our whole society.

This may be just the beginning. We may someday require a drug or alcohol test as part of a driver's license renewal. I do not know. We check sight and we check whether or not they know the rules.

Please understand that we are not trying to pick on you. I understand that there may be some concern that we are going to test the pilots, but we do not test the private operators.

What we are doing is going after the professions here, those who professionally do this for a living, regardless of what particular industry that they are in.

I think it is a menace to our society, and I think collectively we have to work together. Therefore, I do not buy the argument that just because someone is a professional that he should not be treated differently than someone who drives a car up and down the road.

I think the Chairman has pretty much indicated that we feel that that is beyond our scope because if we run into the trouble with the general public that we run into with you, then let us just throw up our hands and say there is nothing we can do about this.

It is back to the theory that too many people today feel that the drug problem is a job for the cops. It is a job for the prosecutors. It is all of our problem.

And while I think more penitentiaries and tougher laws are very important, I would simply say that unless we do something to cut down the demand side for drugs, no matter how many jails, how many good prosecutors or good policemen we have, the supply is going to meet demand. And so, it has to be a dual approach. And this is what we are doing with you in your industries.

Mr. O'Connell, I must tell you that I was discouraged after all of the consideration we tried to offer to hear your testimony. I am sure that the lady that you introduced today is drug-free. The problem is you think there are some people in your industry that do not have a drug problem and I am telling you you are wrong because time after time, statistic after statistic proves that we underestimate how deeply this has gone into our society.

And I do not know, Mr. Chairman, how we get away from these human factors. Certainly when you talk about listening at the door and all of those kinds of things, you know, that is a concern.

I wish that I could be more sympathetic to what I recognize is a problem with regard to individual rights and constitutional rights. But sometime when society is threatened, as threatened as it is with this, in my opinion, and maybe nobody else in the room thinks that is important, but I think it is important and I think that most of my colleagues think that is extremely important.

And so we are not trying to dehumanize anything. We are trying to put through as foolproof a system as we can to provide for a deterrent, and that is what the word comes back to. And if people who have never used drugs have never thought of using drugs or will never use drugs have to be tested as part of that deterrent, I say so be it.

Now, we do not want to be unreasonable. Let me get back—I think it was you, Captain Stone, who talked about—yes— $\frac{1}{2}$ of 1 percent error on testing that would cause 200 pilots, maybe half of them without cause or without proper cause to lose their jobs. It is a serious concern to me.

Do you not believe that can be handled by writing rules and regulations or in the law to provide for a subsequent test to prove whether the first test was right or wrong?

While the military experience has been discounted here this morning, I think we cannot discount it. The military tells me that they have practically no doubt, absolutely no doubt when someone comes back positive as far as illegal drugs are concerned. It is positive. Can we not work out some kind of provision? If I am found to have drugs, is there not any appeal that I have if I were a pilot?

Mr. STONE. Well, unfortunately in the system that is present in the airline industry, there are a couple of problems. One of them is that the FAA currently believes that the Health and Human Services guidelines do not permit what we call second or a split sample, that the initial sample which can be contaminated in a lab has to be the sample that is used.

And we have pleaded with them that even in the federal work place there are split sample systems, and we will try to turn that around.

Right now we are being told we cannot have a simple—what we want to take is as the urine sample is received is to split it into two containers, seal them with evidence tape, and hold one sample with the tamper proof tape that is never opened and allow the test to be run and the second sample to be kept to verify the original sample. That is the one that the FAA says we cannot use that system.

Senator EXON. Well, Captain, if they are doing that, then I say that is wrong, because I think most of us here are going to insist as best we can that there be a backup because any one of us could be caught, and I certainly feel for even one pilot.

Mr. STONE. Let me tell you of another instance—and this shows and I think we have to change the attitude, and it is not really the FAA. I really should talk about the DOT because this is where the attitude comes from.

The CHAIRMAN. If you would yield at that point, earlier this morning Secretary Skinner did attest to a split sample. Maybe he has changed.

Mr. STONE. No, I think he said it should not be there.

The CHAIRMAN. No, he attested that we were going to take a dual sample and hold one in abeyance.

Mr. STONE. I think he was referring to, as I heard later on, and I do not think he was very clear in his own mind what was going on, but the purpose of the test—he was talking about first the screening test, which is the first test, it is all done on the same specimen. The first test is the one that is not very air-free. The second one is a gas chromatography with a mass spectrometry. That is the confirmatory test. That is the thing he was talking about, not the split sample system that I am speaking about where there are two specimens. One of the specimens can never be contaminated by the laboratory, and that is the one that if you have a problem, you at

least know that that is the one that can go to an independent lab and be verified.

Senator EXON. I assume it follows, then, if one test shows up a positive test and the sealed sample shows that it was not, then there is something wrong in the testing procedure?

Mr. STONE. And that is a great liability for the laboratories, and that is what the laboratories are very concerned with.

Senator EXON. I am not worried about the laboratories.

Let me ask you this question, Mr. Stone. If we could have a proper appeal or a proper protection from the concerns that you just cited which I think are legitimate ones, would you then favor the random drug testing program?

Mr. STONE. I marvel at your sense there, Senator, because I think you read my mind.

The other issue I wanted to bring up was the appeal. Right now the sense of what DOT has told the FAA to do is to put into place a system where the final determination of how that individual, what that individual has after the test is found positive, judgment is made by the medical review officer whether that test, in fact, is a true positive, and he is also—the medical review officer is the one that asks the individual if there is any other alternative medical explanation for his positive.

But the problem we told the FAA and the DOT, and the DOT keeps pushing it, is that that individual is going to be a company paid medical review officer. There is no independent appeal, there is no appeal from the company employee who makes the final determination on whether that is a positive or a negative, and we have great trouble with that, and the DOT says we are not going to change it.

Senator EXON. If we change that, would you be in favor of random drug testing?

Mr. STONE. I would be more comfortable with random drug testing. My problem is that it—tests like they are doing—let me tell you what it costs the DOT right now to get their—what was the number—103 positives in the Department of Transportation, and you tell me whether that is reasonable. They spend \$4.2 million annually drug testing their 32,000 workers in the almost two-year period, now approaching \$8 million that they have found 103 workers positive. Is that cost-effective.

Senator EXON. It is cost-effective it seems to me if we are going to seek a drug-free work place. It is going to cost some money. There is not any question about that.

Mr. STONE. I think we have a better system. I think we have a high degree of education, a peer program that watches people on the job and knows what their problems are on the job and leads them humanely to treatment.

Senator EXON. You then think that because of their higher education and the fact that they are more observed that the pilots should be excluded, but the truck drivers should be included?

Mr. STONE. No, I believe that everybody should have the same system that we have which is a broad—and I would go further than that. I think we needed it in this country. I think we need to spend more money in education, and we need to do what the 'ads are, as you know, a drug-free America—I cannot remember the

name of the advertising agency that is running this, that runs the ads in New York. I cannot remember, but they are trying to change the attitudinal qualities of this nation about drugs, and I think that is a very necessary thing.

Senator EXON. You think it would suffice if we put up in every cockpit and every truck "Just Say No." Do you think that would work?

Mr. STONE. No, sir, I do not think so. Absolutely not. Our program does spend a lot of money, but it teaches people what happens with alcohol or what happens in the disease process, and I think that is necessary to really help people.

Senator EXON. Gentlemen, I am working very hard to understand your concerns. The more I ask questions, the more I get down to a basic concern that I think at least you and a percentage of your membership are just against it, period, for reasons that might be valid.

I want to continue to work with you because I want to assure that this Senator—and I think you know most of us on this committee pretty well—were not out to get anybody. We are legitimately concerned about this. I think as individuals, as fathers, as husbands, as grandfathers. Good Lord, you must be as concerned about this problem as I am. But when it comes down to your own proper situation, you sit there and say well, really, this is not a concern. We just do not have this problem.

You are wrong. We want to continue to work with you, but I for one am going to do everything that I can to see that we push through something reasonable, and I think a key part of this is to make sure that when we get it through—and that is what we should be working together on—that the rules and regulations are not oppressive, overly oppressive, so that it is made unfair. Thank you. Captain Stone.

Mr. STONE. Senator Exon, let me make it clear to you that I might not have been here about three months ago, and I wanted to tell you I think this troubles me as a citizen.

My wife and I were driving home after an evening on a dark, large road, and we were traveling about 55 miles an hour, hit from the rear by a car, and turned us around and put us into a guard-rail, almost totaled our car. The driver continued on.

A policeman came up to me later on and I said what are you going to do about the guy that hit us? It was a hit and run. And he said, we have a lot of drunks around, but we have no way to get at them.

So, that is a real problem. I do not know what we can do with that problem either.

Senator EXON. Well, I think that is a problem, but I do not think that we can solve that in a random drug testing bill, and we are not trying to solve the whole problem.

And the only thing I say is that is a sad case, but that in my view does not argue for not going ahead with real random drug testing.

Thank you, Mr. Chairman.

The CHAIRMAN. The committee is indebted to each of you. You have presented very valuable evidence here this morning for us.

We appreciate very, very much your appearance here this morning.

The committee will stand in recess, subject to the call of the Chair.

[Whereupon, at 12:40 p.m., the committee adjourned, subject to the call of the Chair.]

ADDITIONAL ARTICLES, LETTERS, AND STATEMENTS

STATEMENT OF R.V. DURHAM, DIRECTOR, SAFETY AND HEALTH DEPARTMENT, INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Mr. Chairman, my name is R. V. Durham. I am the Director of the Safety and Health Department of the International Brotherhood of Teamsters. I thank you and the Committee for this opportunity to present our views regarding substance abuse in transportation, and particularly S.561.

As the collective bargaining representative for nearly a half million workers employed in the motor carrier, railroad, and airline industries, as well as other transportation modes, we share a common goal with the members of this Committee: eradication of substance abuse among transportation workers. When an individual who operates a train, bus, truck, or airplane poses a danger because of alcohol or drug abuse, we want that corrected just as badly as anyone in the Congress.

The International Brotherhood of Teamsters has consistently been a leader in the fight against substance abuse. We have demonstrated this leadership by educating our members about substance abuse, by establishing counseling, referral and rehabilitation programs to assist our members who seek help for substance abuse problems, and by bargaining with our employers to establish reasonable, rational testing programs to identify substance abusers.

Truck driving is a dangerous job, Mr. Chairman. Only miners face a higher risk of death on the job than truck drivers. We work hard to do whatever we can to make that job safer. On April 19, 1989, I testified before this Committee about the efforts we have made through collective bargaining to make this work safer, less fatiguing and less hazardous to the health of the hundreds of thousands of drivers we represent. We believe, and we think our employers would agree, that enforcement of our contracts has helped make these the safest carriers on the road.

During my testimony in April, I suggested that you turn your attention away from the driver for a while in order to focus on the motor carrier and the shipper. Both play a very important role in truck safety. Shippers, in particular, operate with little or no regulation of their activities. Yet the shippers are the moving force in this industry. They make the demands on carriers for rates that are often below operating costs. And they make the demands regarding delivery times which ultimately force drivers to speed, and to violate hours of service regulations.

While shippers' crucial role in transportation safety remains virtually unregulated, drivers are being inundated with new laws and regulations. Commercial drivers are already feeling the effects of the new alcohol regulations which were mandated by legislation which originated in this committee as part of the Commercial Motor Vehicle Act of 1986, as well as the new licensing, testing and reporting requirements under that Act. We are only a few months away from new DOT-mandated drug testing provisions. It would be prudent to wait and observe the impact of these new initiatives, rather than rushing now to legislate still further in these areas.

Mr. Chairman, the Teamsters Union has faced the drug testing issue for about five years now. Before the Federal Government became involved in drug testing, we had a major collectively-bargained substance abuse program in place. We have learned from our own practical experience, and—together with many of the largest employers in the trucking industry—we have refined that program over time. We believe the program we have developed over the years is a reasonable one. It deals with the realities, the structure and working conditions of the trucking industry. In contrast, we see unrealistic drug testing regulations imposed by the Department of Transportation in which truck drivers are treated essentially the same as airline pilots and tanker captains.

One example of the unrealistic nature of these regulations is the post-accident testing requirement. Assumptions about who is at fault and questions about possible impairment that might be appropriate when an oil tanker hits a reef do not make as much sense when a car driver runs into the back of a semi-trailer.

Another example of the unreasonableness of applying the same drug testing rules across-the-board is random testing. Putting aside for the moment our Constitutional

and other legal objections, it is easy to see that—just as a purely practical matter—a random testing requirement that might be workable when you apply it to an airline or a railroad is not simply workable when you try to apply it to 180,000 small trucking companies.

Now, Mr. Chairman, I would like to address a number of specific concerns that we have with regard to S. 561:

The first concern has to do with what it means to "have used, without lawful authorization, alcohol. . . ." As we understand the law, anyone above the legal drinking age who uses alcohol is doing so with lawful authorization. Clearly, this cannot be what the sponsors mean. But if not, then what? If this refers to the "four hour rule," then there is no chemical test that can tell you whether a driver has used alcohol within the past four hours. If it refers to either the four-hour rule or the .04% rule, then we fail to see how this relates to the requirement for motor carriers to conduct pre-employment, periodic recurring, and random testing of drivers.

Closely related to this is the question of how employers would conduct random and other testing for alcohol. This must necessarily be a blood or breath test, because urine testing for alcohol does not provide information that is usable for enforcement. It is a practical impossibility to provide evidential breath test equipment and qualified technicians to conduct random on-the-job alcohol breath tests. Given the difficulty that many police departments have in marshaling these resources, it is unrealistic to expect private employers—especially smaller ones—to do this. Another consideration is that even evidential breath testers are not of much use at low levels of alcohol.

That leaves blood testing. In addition to putting the constitutional questions regarding random testing in a somewhat different perspective, it raises new issues in terms of informed consent; it requires different qualifications for collection site personnel; it changes the physical requirements for collection sites; and it will entail a new laboratory certification program. I urge this Committee to at least probe these issues more deeply before plunging ahead with legislation in this area.

Another issue that you may want to think more about is that S. 561 not only expands these testing requirements to include both alcohol and drugs, but also extends them to all commercial motor vehicle operators as defined by the Commercial Motor Vehicle Safety Act of 1986—thereby nearly doubling the number of workers subject to drug testing, compared to the present DOT regulations. When others are coming before Congress to complain that there are not enough certified drug testing laboratories now to handle the business, this may not be the best time to add two or three million additional workers to the pool.

We do see some positive aspects to S. 561. One of the most important is the stipulation that drug testing laboratories must meet certification standards of the Department of Health and Human Services. When a worker's career, livelihood and reputation are on the line, we must have the greatest possible assurance of the competence and integrity of the laboratory. Certification by DHHS provides this. (However, the introduction of alcohol testing introduces new variables into this equation. I urge you to carefully consider the implications of this alcohol testing mandate for laboratory certification.)

Another very positive feature of S. 561 is the requirement that the Secretary of Transportation issue regulations with requirements for rehabilitation programs for commercial drivers and airline workers with substance abuse problems. We believe strongly that this is the correct approach. This could be strengthened considerably, though: Currently, S. 561 affords too much discretion to the Secretary in determining the circumstances under which rehabilitation shall be offered to workers identified through testing as substance abusers. The previous Secretary clearly demonstrated an unwillingness to mandate an opportunity for rehabilitation. We have no reason for optimism that the current Administration would act differently if left with a choice. We also believe that our members and other workers employed by railroads deserve the same opportunity for rehabilitation as S. 561 affords airline pilots.

Mr. Chairman, this concludes my remarks today. I want to thank the Committee again, on behalf of the Teamsters Union and our 1.6 million members, for this opportunity to have our views considered on this matter of great importance to our members.

STATEMENT OF DENIS R. ZEGAR

I am Denis R. Zegar, Vice President for Government Relations of the National American Wholesale Grocers' ("NAWGA"). I welcome this opportunity to address the Committee and present our views on S. 561 and transportation drug testing spe-

cifically. NAWGA is generally supportive of the mandatory drug testing program adopted by the Department of Transportation (DOT), and particularly of the rules relating to commercial motor vehicle drivers promulgated by the Federal Highway Administration (FHWA). At the same time, several features of the DOT testing program raise concerns that should be addressed by Congress through S. 561.

I. BACKGROUND

NAWGA is a national trade association comprised of grocery wholesale distribution companies which primarily supply and service independent grocers throughout the United States and Canada. It provides research, technical, educational and government relations programs on behalf of its 400 members. NAWGA members operate nearly 1200 distribution centers nationwide with a combined annual sales volume in excess of \$81 billion, accounting for nearly three-fourths of the nation's grocery supply sales. NAWGA members employ in excess of 350,000 people nationwide but, in combination with their independently owned supermarkets, they provide employment for several million people. The independent grocer represents over 50% of the total retail food sales in this country and is one of the strongest segments of independent business in the country. NAWGA's foodservice division, the International Foodservice Distributor's Association (IFDA), represents member firms that sell annually over \$20 billion in food and related products to the institutional, away-from-home foodservice market. In addition, NAWGA has over 20,000 trucks on the road each day delivering fresh products to grocery stores, restaurants and schools and other institutions. NAWGA celebrated 80 years of service to wholesale grocers in 1986.

NAWGA has been a leader in developing programs to assist employers in establishing substance abuse and drug testing programs. Its "Model Substance Abuse Program" (1986) and "Supervisor's Guide to Limiting Workplace Substance Abuse" (1988) have provided guidance to numerous corporations in a broad range of industries, including trucking, airlines and marine. NAWGA also conducts supervisory training and certifications programs on substance abuse for member companies and other firms that meet the requirements of DOT's drug testing regulations (See Appendix).

NAWGA has long been supportive of Federal means to enhance safety by ensuring that commercial transportation operations in the United States are "drug-free". Toward this end, NAWGA has supported the efforts of this Committee and of the DOT to establish substance abuse testing requirements—including random testing, the most effective deterrent to drug use—for workers engaged in transportation activities. NAWGA has also filed legal briefs, as an *amicus curiae*, supporting DOT's testing programs in *Skinner v. Railway Labor Executives Association*, 57 U.S.L.W. 4324 (1989), and *Owner-Operators Independent Drivers Association, Inc. v. Skinner*, 705 F. Supp. 481 (N.D. Cal. 1989).

II. THE FHWA REGULATIONS

NAWGA supports the mandatory drug testing rules issued by the DOT and its subordinate agencies, such as the FHWA, and believes that widespread testing will identify drug-using workers in transportation operations and deter further drug use. Through its adoption of scientifically accurate testing requirements (such as the use of gas chromatography/mass spectrometry—GC/MS—for confirmation of positive screens) and rigid security procedures (including specified "chain of custody" rules), the DOT has gone to substantial lengths to assure the accuracy and fairness of its testing program to covered workers.

While the testing rules and procedures adopted by DOT were influenced by the desire to ensure technical accuracy and fairness to tested individuals, they establish burdensome and bureaucratic requirements that suppress currently effective systems and programs implemented by large numbers of companies. This is particularly true with respect to the role of the Medical Review Officer (MRO), as envisioned by the FHWA regulations and DOT's interim procedural rules. It is NAWGA's view that the rules governing the substantial responsibilities of the MRO should be dramatically revised. The current provisions concerning the MRO's receipt, review and analysis of test results (including retention of testing records for an extended period) promise to be extremely costly and burdensome, particularly for smaller companies.

The provision requiring a MRO to review all employee tests—is a costly and unnecessary practice. Paramount in importance, however, is that the process of review is so cumbersome that the safety of the driver and general public may be in jeopardy.

First, the functions of the MRO are duplicative in many areas. One of the purposes of the MRO is to evaluate the test results and determine that no irregularities are apparent. The report sent to the MRO identifies the drugs/metabolites tested, whether positive or negative, the cutoff for each, employer specimen number and the accession number. However, all this information was already lab certified by an individual with "documented scientific qualifications in analytical forensic toxicology." Such a person is usually a Ph.D. in biology, chemistry, pharmacology or toxicology. Individuals with such training in toxicology and pharmacology are generally far more qualified in the technical aspects of urine testing. The responsibility for the accuracy and quality of the test results should lie with the laboratory not with an intermediary. This particular function of the MRO is costly and unnecessary.

The regulation also requires that the MRO receive the test results BEFORE the employer. They also require that the lab report all test results to the MRO within an average of five working days. If the test result is positive, the MRO must then notify the employee to discuss the results. This process could easily take several days given the doctors own time constraints and the truck drivers unavailability. In the meantime, the driver is operating a motor vehicle under the influence of a controlled substance without the employer's knowledge. Yet, if the driver should have an accident, the employer would be held culpable. The employer must retain the right to remove the driver from the workforce as soon as possible after learning of the positive result. This is for the benefit of the driver as well as the welfare of the general public.

Under the current regulations, the MRO shall determine whether the drug being used is for legitimate purposes and whether it should be reported to the employer as a negative. Once again, the employer has considerable legal responsibility, insurance considerations as well as their own company policies pertaining to operating a motor vehicle under the influence of prescription or controlled substances. It would be much more efficient and practical if DOT required that employers seek prior confirmation of legal prescription use rather than through a costly, time-consuming and burdensome process currently under consideration. Enough safeguards can be built into the pre-test consent form to protect employee rights, as presently is the case with the MRO.

Last, but not least, thousands of companies are currently testing for drugs and have had relatively few problems. Today, the trucking industry is facing a terrible labor shortage of qualified drivers. It is not in the best interest of the employer to act arbitrary or capricious because that employee can find other employment very easily. However, many companies have explicit policies governing substance abuse, which are legal, fair, and well communicated to all concerned. Government must be careful not to interfere with company policies and practices that are in place to protect its employees and the general safety of the public.

The role of the MRO, as well intentioned as it may be, seriously impinges upon the rights of employers, as well as that of the general public. The Committee should take a close look at the role of the MRO and determine if the additional \$30-\$35 cost, the loss of valuable time, the tremendous record keeping burden, and the duplicative nature of the MRO function is warranted or even necessary. It should be noted that a good company policy regarding substance abuse coupled with a form of EAP offers adequate protection to the rights of the employee.

Drug screening

The number of drugs subject to DOT testing, as defined in 49 C.F.R. Part 40, should be expanded from its current group of five substances (marijuana, cocaine, opiates, amphetamines, and phencyclidine). Under DOT regulations, an employer can only test for five drugs, which exclude barbiturates, benzodiazepines and alcohol. One possible explanation of this may have been the lack of sufficient time to promulgate adequate standards. The Committee should take the necessary steps to expand the number of drugs presently allowed to be tested under DOT. Under current law, the employer would have to require two separate samples in order to test for these drugs. This adds additional monetary and administrative costs. Presently, the two tests recommended by DHHS for all initial screens are ABUSCREEN and EMIT, which test for eight to 10 drugs, respectively. Why shouldn't an employer know if a driver is using Benzodiazepine (Librium or Valium) or is taking methadone? If this Committee is serious about safety and working towards a drug free America, it should consider allowing employers to test drivers for the same drugs they currently test their own employees.

Finally, as envisioned by S. 561, the FHWA testing requirements should be expanded to include tests for alcohol use. While such testing would be desirable in all tests covered by the DOT rules and any corresponding legislation, it is particularly

necessary—because of the relative speed with which evidence of alcohol use passes from the body—in two test settings: “reasonable suspicion” and “post-accident” tests.

Certification

The Committee should ensure that the Department of Health and Human Services and the National Institute on Drug Abuse (NIDA) accelerate the drug-testing laboratory certification process. On June 1, 1989, NIDA listed only 23 certified laboratories for use by Federal agencies, and in turn by DOT-covered employers. 54 Fed. Reg. 23539. The total was only three more facilities than were listed in April. 54 Fed. Reg. 13661 (April 4, 1989). NIDA's review process must be accelerated if all entities covered by the DOT rules are to achieve compliance.

III. CONCLUSION

NAWGA strongly supports this Committee's efforts to enact a comprehensive drug and alcohol testing program that covers employees engaged in commercial transportation operations. The enactment of specified statutes requiring such testing will eliminate any contention that, in mandating such tests, the Secretary of Transportation has exceeded his authority. It would also prevent the possible recession of that regulatory action by some future administration. The consideration of S. 561 also provides this Committee and the Congress with a desirable opportunity to “fine-tune” the generally positive steps that the DOT has taken through regulatory action.

NAWGA appreciates this opportunity to provide its views to the Committee on the subject of drug and alcohol testing transportation industries. We would be happy to provide any further assistance or input to the Committee and its staff as deliberations on S. 561 proceed.

STATEMENT OF AMERICAN AIRLINES, INC.

American Airlines, Inc. strongly supports the right of air carriers to test their employees, under appropriate circumstances and subject to specified safeguards, for drug and alcohol abuse. Clarification of such right by means of legislation and/or administrative rules is required to ensure the highest degree of safety in air transportation.

AMERICAN'S ALCOHOL AND DRUG POLICY

American has long maintained and enforced general rules of conduct relating to its employees, including rules pertaining to consumption of alcohol and use of drugs. These rules are set out in an internal company regulation.

On March 1, 1988, American amended that regulation to include an Appendix specifically providing for alcohol and drug testing in all cases where there is reasonable suspicion to believe that an employee is in violation of company rules. A copy of that Appendix is attached. It should be noted that Section E thereof provides that where reasonable suspicion exists, the company may *require* the employee, as a condition of continued employment, to cooperate in urinalysis testing, and may *offer* an employee the opportunity to cooperate in blood testing. A blood test will not be required as a condition of continued employment, but an adverse inference may be drawn from an employee's refusal to submit to a blood test when reasonable suspicion of intoxication exists.

APPLICATION OF THE POLICY TO AMERICAN'S PILOTS

Following publication of the Appendix, the Allied Pilots Association, in its capacity as the duly certified labor organization representing the pilots employed by American, sought an injunction against enforcement of the policy as to flight crew members. The basis for the Association's action was its view that drug and alcohol testing of pilots was a matter subject to collective bargaining, and that in the absence of appropriate provisions in the collective bargaining agreement, American has no right to test pilots for drug or alcohol abuse, notwithstanding reasonable suspicion.

On May 15, 1989, Judge A. Joe Fish of the United States District Court for the Northern District of Texas, Dallas Division, issued a preliminary injunction specifically precluding American from implementing or applying the provisions of its alcohol and drug testing policy to its pilot employees “until such time as the parties have reached agreement on the terms of such Appendix or the statutory procedures

of the Railway Labor Act for the resolution of 'major' disputes have been satisfied; . . ."

American is currently seeking a stay of the preliminary injunction pending an appeal of the order.

THE RULES OF THE DEPARTMENT OF TRANSPORTATION AND FEDERAL AVIATION ADMINISTRATION

American firmly supports DOT's "Anti-Drug Program for Personnel Engaged in Specific Aviation Activities." (53 FR 47024; November 21, 1988) While we would have preferred that those regulations go even further in a number of areas (e.g., testing of additional employees, mandatory rehabilitation programs and testing for additional drugs), the DOT rule is nevertheless well conceived and will be an effective means of curbing drug abuse by airline employees. Under the terms of Judge Fish's injunction, any plan submitted by American to the FAA meeting the specifically mandated requirements of the rule may go into effect notwithstanding the provisions of the collective bargaining agreement.

However, since the DOT rules do not provide for alcohol testing, American will continue to be precluded from even requesting that a pilot voluntarily submit a blood specimen despite reasonable suspicion of intoxication. In American's view, this is an intolerable situation which makes it difficult, if not impossible, for American to enforce several specific provisions of the Federal Air Regulations relating to use of alcohol. These regulations (14 CFR 91.11) prohibit any person from acting or attempting to act as a crew member: (1) within eight hours after the consumption of any alcoholic beverage; (2) while under the influence of alcohol; or (3) while having .04 percent by weight or more alcohol in the blood. While testimony of witnesses may be used as proof that a pilot has violated the eight hour rule or has shown signs of being "under the influence," only a blood test can determine whether a pilot's blood alcohol content exceeds the specific limit set forth in the FAA rules. Paradoxically, these rules do not expressly authorize such testing and a court has now expressly denied the company's right even to request that it be done on a voluntary basis!

CONCLUSION

In American's view, legislation and/or administrative rules expressly confirming the right of an air carrier to test for alcohol under appropriate circumstances are clearly needed. Such testing should be limited to situations in which there is reasonable suspicion that an employee is under the influence of alcohol. If an employee refuses to submit to blood testing under those circumstances, the company should be expressly permitted to draw an adverse inference from such refusal and to use such inference in support of further administrative action, including termination of employment where appropriate.

Statement of the
College of American Pathologists
to the
Committee on Commerce, Science, and Transportation
U.S. Senate

June 15, 1989

The College of American Pathologists (CAP) is a national medical specialty society representing more than 10,500 physicians who are board certified or are eligible to be certified by the American Board of Pathology. College members practice their specialty in community hospitals, medical schools, teaching hospitals, independent medical laboratories, medical examiner/coroner offices and federal and state health facilities.

Since it was established in 1947, the College has been dedicated to the pursuit of excellence in all areas of the medical laboratory. The goal of this dedication has been to continually improve the availability of quality laboratory services to the American public.

The CAP has been performing on-site inspections for accreditation of laboratories for more than 25 years and has been a provider of inter-laboratory comparison programs (proficiency testing programs) for more than 30 years. Currently the College accredits more than 4,000 laboratories and provides the largest proficiency testing service in the world serving more than 15,000 laboratories. Since 1987, CAP has offered a Forensic Urine Drug Testing (FUDT) Accreditation program and a FUDT proficiency testing program sponsored jointly by the CAP and the American Association for Clinical Chemistry (AACC). To date 48 laboratories have completed the inspection process and have been accredited by CAP's FUDT program. Eighteen additional laboratories are in the final stages of the process which leads to accreditation. Today 251 laboratories are enrolled in the CAP/AACC FUDT Confirmatory Proficiency Testing Program, and 204 laboratories are enrolled in the CAP/AACC FUDT Screening Proficiency Testing Program. (The screening program uses the same specimens as the confirmatory program with the only difference being in the extent of testing performed.) Based on this level of interest, the College believes that there are probably a minimum of 200 laboratories in the United States which may be candidates for forensic urine drug testing inspection and/or accreditation.

As evidenced by its involvement in the establishment of programs employing stringent forensic standards for urine drug testing laboratories, the CAP has clearly demonstrated its support for the Department of Transportation's goal of a drug-free transportation work place and endorses a role for Federal development of criteria for certification of forensic urine drug testing laboratories. The CAP also strongly encourages the development

of criteria which will allow for acceptance of alternative private sector certification through the use of programs operated by nonprofit accrediting organizations.

While CAP supports the intent of S.561, the College strongly opposes the adoption of the "Mandatory Guidelines for Federal Workplace Drug Testing of the Department of Health and Human Service" (53 FR 11970, Federal Register, April 11, 1988) as the only standards by which a laboratory may be accredited to perform drug testing for DOT-regulated industries. Although these guidelines, developed by the National Institute on Drug Abuse (NIDA), offer a number of excellent requirements for development of a urine drug testing program, the College believes they incorporate overly restrictive criteria and add an inordinately high cost to participating laboratories. By establishing standards which are stricter than those commonly promulgated by the clinical laboratories industry, the HHS and NIDA are restricting the availability of laboratories which are now performing forensic drug testing from participating in the drug testing program. By adopting NIDA's guidelines, the DOT will severely restrict efforts to achieve its goal of a safe transportation system by identifying drug misuse by DOT-regulated industry employees.

To date, NIDA's program has only certified 23 laboratories in 15 states; five of these laboratories are in California. The attached June 1, 1989 Federal Register contains the current list of NIDA-certified laboratories which meet the minimum standards to perform drug testing. The list shows a wide geographic disparity, resulting in many employers with drug testing programs in place having to transport specimens long distances to NIDA-certified drug testing programs. An employer in Montana, for example, would have to ship specimens to Seattle, Washington. There are entire pockets in the United States, in fact, not currently serviced by either NIDA or CAP-certified laboratories such as the New England states and the northern midwestern section of the country. Committee members from Texas, Virginia, Wisconsin, and Washington have NIDA-accredited laboratories in their states.

Among the members of this Committee, for instance, the following states are currently not being served by either NIDA or CAP-accredited laboratories: South Carolina, Hawaii, Kentucky, Nebraska, West Virginia, Massachusetts, Louisiana, South Dakota, Arizona, and Montana.

The CAP/AACC Forensic Urine Drug Testing Program, on the other hand, has to date accredited 48 laboratories in 24 states; 13 of these labs are both NIDA and CAP/AACC accredited. Senate Commerce Committee members whose states have CAP-certified laboratories include: Tennessee, Texas, Nevada, Virginia, Missouri, Oregon, Arkansas, Wisconsin, Washington, and

Mississippi. If only NIDA-approved laboratories are allowed to conduct Federal drug testing, it is doubtful the demand for testing of DOT employees can be met by these laboratories.

Based on the CAP proficiency testing program, there are to date approximately 200 laboratories in the country with forensic drug testing capabilities. It is the College's opinion, however, that some of these laboratories are not applying for CAP certification because of their concern over legislation directing that only NIDA-certified laboratories will be able to conduct forensic drug testing for the Department of Transportation regulated industries.

The guidelines established by ADAMHA were developed from a model which evolved in the military -- an environment which due to the military's mission, disciplinary requirements, and transience of personnel, requires regimentation and an inflexible approach. While appropriate in this environment, the guidelines are inordinately restrictive, cost ineffective, and needlessly cumbersome for private sector laboratories. The College does not support a diminution of standards requisite for accuracy of test results; protection of the employees rights; or forensic defensibility. However, we believe that standards developed for any forensic urine drug testing program must be flexible and responsive to the needs of the public. The technology in this area is dynamic and all parties must have the capability to utilize these advances.

In the development of private sector accreditation program criteria, appropriate NIDA criteria concerning accuracy and employee protection should be incorporated. The development of such a program must actively involve forensic toxicology experts, private not-for-profit accrediting bodies with experience in the field of forensic urine drug testing, and federal agency personnel. The College offers its support and assistance to the Department of Health and Human Services (DHHS) and any Federal agency in the development of acceptable alternatives to the NIDA program.

The standards of the NIDA and College FUDT programs are very similar. A reason for these similarities is that many of the same individuals were involved in the development of the two programs.

With the exception of some minor technical differences between the NIDA and the CAP programs, we believe that the two programs are equivalent, and that the CAP/AACC program adequately addresses accuracy, employee protection, and all other issues involved in forensic urine drug testing. We have attached a description of our program for the Committee and will describe some of these differences.

The major differences between the two programs involve frequency of the inspection process, the philosophy of the inspection procedure, the frequency of proficiency testing, and cost. In each of these instances, we believe that the CAP/AACC program is more realistic and responsive to the needs of employees and employers, and does not compromise the validity of forensic urine drug testing.

TESTING FOR SPECIFIC DRUGS

Employee drug testing is conducted in several ways and for several different purposes. Most commonly, drug testing is performed as a pre-employment requirement. In certain industries, random drug testing is also performed and in other organizations, drug testing is done when an employee is suspected of drug usage, or there is some threat to public safety, such as in the transportation industry. The list of drugs specified in the NIDA guidelines (marijuana, cocaine, opiates, amphetamines, and phencyclidine) is limited, and was incorporated as a response to a Presidential Executive Order. The drugs listed are only several of those which may be of interest to employers. Many other drugs may be a threat to public or personal safety, such as Valium and other drugs which may affect employee performance. A major concern to employers is alcohol abuse, and under the NIDA guidelines, testing for alcohol is not a requirement. If an employer wished to have an individual tested for other substances such as alcohol, a separate specimen must be submitted for that purpose. The laboratory is precluded from testing for substances not included in the guidelines.

The list of drugs to be tested should be left to the discretion of the employer. The current list of drugs for testing under the NIDA guidelines is not representative of the multitude of drugs commonly subject to abuse. With the continuous creation of new "street drugs," any list of allowable drugs for testing would be obsolete before the legislation was passed or regulations promulgated.

The laboratory selected by the employer should be responsible for documenting that analytical and control procedures utilizing both screening and confirmation methods are in place for selected drugs.

SCREENING LEVELS FOR DETERMINATION OF PRESUMPTIVE POSITIVES

When evaluating screening levels for drugs, one must consider both sensitivity and specificity. Sensitivity is the ability of a procedure to identify all drug users -- it may, however, incorrectly identify some non-drug users. Specificity is the ability to identify a drug with certainty -- that is, it should

not incorrectly identify a drug-free individual as a user. The ideal screening test is both sensitive and specific, but because tests may be imperfect, both screening (sensitive) and confirmatory (specific) tests are necessary.

The choice of a screening test should be a function of its ability to mirror the specificity of the confirmation test. A more specific and equally sensitive antibody used in an immunoassay screening procedure permits the laboratory to identify with more certainty the presumptive positive samples, referred for confirmation testing. A less specific antibody will identify a higher number of presumptive positive samples, some of which will eventually turn out to be negative. Samples testing presumptively positive with immunoassay screening should be confirmable by gas chromatography/mass spectrometry if the actual drug or drug metabolite is present. Since drug testing equipment and reagent manufacturers use different assays with varying specificities, and differing technology, cut-off levels for drugs will of necessity vary.

Due to the varying specificity of different screening methodologies, screening thresholds should be screening-method dependent. In principle the screening threshold should be set so that 95 percent of samples containing drug or drug metabolic concentrations at the confirmation threshold are identified as positive by the screening method. Taking the detection of marijuana use as an example with its 15 ng/ml confirmation threshold, the SYVA EMIT Cannabinoid screening threshold should be 50 ng/ml while that for the Abbott FPIA Cannabinoid screening threshold should be 20 ng/ml.

REPORTING OF TEST RESULTS

The present NIDA guidelines provide that when a number of urine samples are tested, and one or more are found by the screening procedure to be positive, no results of the screening can be released to an employer until the confirmatory tests of those positive samples have been completed. This requirement has severe economic impact in the work place.

Screening results which are negative can and should be immediately reportable while positive samples are being confirmed. Employees screening negative can be rapidly returned to work or hired, as the case may be, resulting in significant economic savings without the compromise of accuracy of the testing procedure, or violation of the rights of the employee. Modification of this requirement, therefore, could allow wider availability of testing capability, as long as stringent requirements for employee protection, chain of custody, and specimen integrity are in place and followed.

FREQUENCY OF INSPECTION

For FUDT laboratories, the CAP believes that an annual in-depth on-site inspection, supplemented by an interim semi-annual self-evaluation (using the same checklist as used during the annual on-site inspection) plus quarterly monitoring of proficiency testing results, will provide sufficient incentive for the laboratory to maintain acceptable standards of performance. This also will allow an appropriate level of monitoring by the accrediting agency and semi-annual examinations as required by NIDA are not necessary. Scientific studies conducted by the CAP and statistical reviews by the Centers for Disease Control (CDC) indicate performance is adequately maintained with less frequent inspection than adopted by the DHHS. Since 1969, the College has had equivalency with the Clinical Laboratory Improvement Act (CLIA), under which CAP inspections have been accepted in lieu of federal inspections. For many years, both federal inspections for non-CAP laboratories and CAP inspections were performed annually. After a study of recurrent deficiencies across a period of several inspection cycles was conducted and data was submitted to the CDC, a waiver of the annual inspection cycle was granted in favor of biannual inspections for laboratories that consistently demonstrated appropriate performance over time.

The philosophy of the inspection and accreditation programs also varies between NIDA and CAP/AACC. While the NIDA inspection requires three independent inspectors, all of whom must agree before a laboratory is accredited, no feedback is provided to the laboratory as to what deficiencies are found or how they may be corrected. On the other hand, the CAP/AACC inspection examines all of the same features as are examined in the NIDA program, but laboratories are given information as to where deficiencies may exist, and an opportunity is given for correction prior to denial of accreditation. It must be stressed that in no instance is a laboratory accredited by the CAP/AACC before it fully complies with all of the requirements for the forensic urine drug testing program.

PROFICIENCY TESTING

Another difference between CAP's FUDT and the DHHS program is the number of annual proficiency testing shipments. The CAP has investigated differing cycles for presentation of surveys in the past. In the best judgement of the CAP expert panels, quarterly presentation of proficiency testing provides adequate monitoring for evaluation of performance. During more than 20 years of federal monitoring, this frequency has become a standard for evaluation of laboratories engaged in testing of critically ill patients. While recognizing the potential legal and social problems which can develop due to inappropriate testing for drugs

of abuse, the CAP has difficulty justifying more frequent proficiency testing for these laboratories than is required for laboratories supporting patient care environments.

Consequently, CAP has established proficiency testing on a quarterly basis for those laboratories that participate in the CAP/AACC FUDT Proficiency Testing Program. We provide ten (10) samples per quarter for a total of forty (40) samples per year. This is contrasted to NIDA which provides ten (10) samples each two months for a total of sixty (60) samples per year. Through extensive research and as evidenced by presentations at the 1987 CAP Conference on Proficiency Testing it is widely recognized that at best, proficiency testing is only one of many monitors of laboratory performance which should be considered with other relevant data such as quality control programs, inspection observations, etc. Proficiency testing certainly should not be used as the primary determinant of laboratory quality. The inordinate reliance of NIDA on proficiency testing is scientifically unfounded, redundant and cost ineffective.

The criteria for the evaluation of the proficiency testing results vary markedly between the NIDA guidelines and the CAP/AACC program. For proficiency testing evaluation, NIDA refers samples to seven reference laboratories. The results are returned, the high and low values are excluded, and the mean of the remaining five is used as the criteria for evaluation of participating laboratories. Criteria for evaluation of proficiency testing in the CAP/AACC program, on the other hand, are based upon peer group review. Long experience with evaluation of proficiency testing has proven that these are the most reliable criteria for such evaluation, and in virtually every instance, the peer group consensus represents the best approximation of the true value of a drug present in a proficiency testing sample.

An additional criterion of the NIDA guidelines is that if a laboratory on a screening proficiency testing sample obtains a positive result for a drug actually present, but its results are either 50 percent above or below the reference value, that laboratory fails proficiency testing and may be excluded from the program. This is an unduly stringent requirement in proficiency testing, aimed primarily at a screening program.

It should be noted that the CAP Toxicology Resource Committee which guides the continuing development of the CAP FUDT Proficiency Testing and Accreditation programs is comprised of 15 members including pathologists and doctoral level forensic toxicologists or clinical chemists with extensive expertise and experience in operation of forensic drug testing laboratories. Three of these members served on the NIDA advisory panel which developed the original guidelines. Through the ten rounds of proficiency testing and numerous inspections which have been conducted, a much more profound base of relevant data to the

state-of-the-art in forensic urine drug testing exists now as compared to only a year ago. The CAP programs continue to be dynamic, evolving to meet the needs of participants while insuring the adherence to requisite forensic standards. The NIDA program is static with little evidence of change projected.

COST OF PROGRAM

A significant difference in the two programs is the cost of inspection and proficiency testing to the laboratory.

The cost to a laboratory for NIDA certification is approximately \$17,000 per year. This fee includes two inspections per year and 10 samples for proficiency testing six times a year.

The College charge for laboratory accreditation varies from approximately \$2,500 to \$5,000 per year. This charge includes an annual on-site inspection and 10 samples of proficiency testing material four times a year.

The NIDA requirement for two inspections per year and the two additional proficiency testing shipments explain part of the differences in fees. Another factor contributing to the differential in fee is the NIDA process which requires three inspectors for the conduct of the inspection, regardless of the volume of testing performed in the laboratory. The College program assigns inspectors based on the volume of testing performed by a laboratory. A low volume laboratory would have two inspectors.

Additionally, the NIDA inspectors are paid for their service through a private contract, and as in any contract there are costs involved to cover overhead and profit. In contrast, CAP inspectors are volunteers and do not receive compensation for their services. A low volume forensic drug testing laboratory conducting 1200 tests per year would pay \$15 per test for NIDA certification. The same laboratory, however, would pay under \$4 for CAP certification. The cost factor is important since, of necessity, it is passed on to the consumer by the laboratory.

ACCEPTANCE OF PRIVATE ACCREDITATION PROGRAMS

The CAP believes that the Secretary of HHS should be required to establish criteria for private non-profit professional organizations to accredit programs in urine drug testing, using NIDA guidelines where appropriate. Such programs should be developed in consultation with individuals knowledgeable about the requirements for forensic urine drug testing, and in consultation with the accrediting bodies. CAP strongly urges that the DOT recognize the equivalency of the CAP/AACC Forensic Urine Drug

Testing Program and the HHS Certification program so that the final rules allow drug testing by laboratories accredited by either agency. By doing so, the DOT will be ensuring that there are sufficient numbers of quality laboratories to carry out the volume of testing mandated by DOT's drug testing program.

SUMMARY

While strongly supporting the intent of S.561, the CAP believes several critical actions must be taken before passage of this legislation:

1. Significant changes must be implemented to certain aspects of the NIDA program or a new set of model guidelines must be developed if there is to be an adequate supply of high quality laboratories to meet demand.
2. An advisory panel of experienced physicians, toxicologists, and industrial personnel involved with development of drug testing programs should be convened with federal agency personnel to ensure development of a set of relevant, practical, and achievable standards which are workable in the private sector.
3. Specific well defined criteria should be delineated for acceptance of private sector accreditation programs which are deemed by the appropriate federal agencies to be equal to or more stringent than proposed federal programs.
4. CAP recommends that the Committee make provisions in this legislation for laboratories accredited by private, non-profit organizations with standards comparable to NIDA guidelines to be permitted to conduct forensic drug testing for the regulated industries under the jurisdiction of the Department of Transportation.

The College of American Pathologists would be pleased to work with NIDA and/or other federal agencies to accomplish the above tasks. Thank you for the opportunity to testify before this Committee on these critical issues.

BEFORE THE
UNITED STATES SENATE
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

STATEMENT OF THE
REGULAR COMMON CARRIER CONFERENCE

ON S.561
ALCOHOL AND CONTROLLED SUBSTANCES TESTING

The Regular Common Carrier Conference (RCCC) appreciates this opportunity to comment on S.561, and particularly Section 12020 of the bill, which would require the Secretary of Transportation to establish regulations requiring motor carriers to conduct pre-employment, periodic, random, post-accident, and reasonable suspicion testing of truck drivers for use, without lawful authorization, of alcohol or a controlled substance. This bill would require post-accident testing of a truck driver when the accident results in a loss of human life, or in those circumstances as determined by the Secretary, involving other serious accidents resulting in bodily injury or significant property damage. The bill establishes a federal test pilot program, in cooperation with the states, for the purpose of random drug and alcohol testing of truck operators.

S.561 also requires the Secretary to promulgate regulations setting forth the requirements for a rehabilitation program for

the identification and opportunity for treatment of drivers who have unlawfully used drugs or alcohol.

It also prohibits the states and local governments from adopting and enforcing laws or regulations that are inconsistent with the federal rules.

Finally, these proposed drug and alcohol testing rules may apply to intrastate carriers, although the bill is not explicit on this point.

I. IDENTIFICATION

The RCCC is a national trade association that represents approximately 350 trucking companies that operate throughout the United States. The RCCC is affiliated with American Trucking Associations, Inc. Collectively, these carriers have annual revenues of about \$16 billion, employ thousands of drivers, and own and operate tens of thousands of tractors and trailers. Our trucking companies transport freight of all kinds which is primarily in less-than-truckload (LTL) shipments. As transporters of LTL shipments, the carriers have established a network of terminals at which freight is picked up, assembled, sorted, and delivered.

The majority of the RCCC trucking companies are unionized. Their drivers are members of the International Brotherhood of Teamsters. Trucking management and the Teamsters recently

renegotiated the National Master Freight Agreement which has extensive provisions dealing with drug testing.

Although the RCCC trucking companies have these attributes in common, they are diverse in their operations, number of drivers, and financial condition, employee benefit and assistance programs, and drug awareness and testing programs. To ascertain the current types of drug testing, its costs and related support programs, the RCCC sent a survey to its Board of Governors in July, 1988. The survey findings are discussed later in this statement.

II. SUMMARY OF POSITION

The RCCC supports the efforts of Congress and the Department of Transportation to deter and detect unlawful drug and alcohol use by commercial truck drivers. We support most of the testing proposals contained in S.561.

A. Drug Testing

The RCCC supports employer drug testing of job applicants for drug use prior to employment. Trucking companies can and many already have incorporated drug testing of driver applicants into their screening process. This is a cost-effective measure that is deterring some individuals who might otherwise seek employment in our industry,

The RCCC also supports periodic drug testing in conjunction with the routine DOT-required medical examinations. Once again, this is a cost-effective procedure. It not only identifies chronic substance users, but also less frequent users.

We support a requirement that employers test drivers when there is reasonable suspicion to believe that drugs have been used. Reasonable suspicion testing is probably the most cost-effective deterrent and detector of drug and alcohol use. The observation of a driver's behavior patterns that are affected by drug and alcohol use are objective and proven ways of detecting drug use. As supervisors become more educated about the symptoms and patterns of drug and alcohol use, we can expect even better results.

Our members also support post-accident testing performed by law enforcement officers when the accident involves a fatality or the officer has reasonable suspicion to believe the truck driver has used drugs. If a multiple vehicle accident is clearly not the fault of the truck driver, testing should not be required even if substantial property damage occurs. Such testing should be left to the discretion of the law enforcement personnel on the scene of the accident since they are in the best position to judge the causation and need for testing. By tying testing to reasonable suspicion, this bill would remove the Constitutional impediments that have resulted in a federal court injunction of

DOT's post-accident testing provisions where reasonable suspicion is not present.

Finally, the RCCC supports the proposed federal test pilot random testing program. This approach would put all drivers at equal risk, including the owner-operators and small carriers. It would act as a deterrent to drug use by truck drivers. As important, it would allow the government to obtain more reliable statistics about the extent of drug and alcohol use in the industry.

A requirement of random testing by employers is premature. For various reasons discussed later, this legislation should not now require random testing by employers.

B. Alcohol Testing

The RCCC concurs with the testimony of DOT Secretary Skinner that there is a need to examine this matter carefully through an advanced notice of proposed rulemaking. To quote him, there is an "overreaching need to proceed with full justification and care, not with righteousness or vindictiveness." A rulemaking will allow the development of the facts about alcohol use in the trucking industry and is the best approach to the situation.

As this Committee is aware, alcohol presents two special problems not related to drug use. First, alcohol consumption is not illegal, but impairment or drinking on the job are.

Second, alcohol dissipates from the system rapidly. As a rule of thumb, one beer or ounce of liquor will be removed each hour. Therefore, the automatic testing for alcohol impairment at pre-scheduled times is not practical.

For these reasons, the RCCC position on alcohol testing is as follows:

Pre-employment and periodic alcohol testing should not be mandated. It would not be effective in deterring and detecting alcohol use since driver applicants and employees can easily rid their systems of alcohol prior to pre-scheduled examinations. We recommend that such testing should be left to the discretion of the examining physician. If he believes an employee has used alcohol or is an alcoholic, the physician can require a test.

The requirement of alcohol testing by employers when they have reasonable suspicion is appropriate. The RCCC supports this cost-effective requirement.

Post-accident testing should be left to the discretion of the law enforcement officer. It requires an immediate judgment on whether to test.

Finally, for the reasons expressed by the Secretary of DOT, we support a rulemaking to evaluate the need for random alcohol testing of drivers.

III. A MANDATORY RANDOM DRUG TESTING
REQUIREMENT IS PREMATURE

The preamble to S.561 states that "the use of alcohol and illegal drugs...has been proven to have been a critical factor in transportation accidents." With all due respect, while that may be true for the railroad or other transportation modes, it is not accurate for the trucking industry. As the United States Supreme Court stated recently in Skinner v. Railway Labor Executive's Assn., there is a well-documented record in the rail industry of drug and alcohol use and its causation of train accidents. (Slip opinion at 2-3).

There is not, to date, similar documentation for the trucking industry. The existing data bases on truck accidents cannot and do not show the extent of drug and alcohol related accidents. To overcome this informational gap, DOT is reportedly preparing to conduct roadside checks of truck drivers. This lack of empirical data is a major reason why a federal district court judge in California granted the request of an owner-operator association for an injunction of DOT's random and post-accident testing rules for truck drivers.

It is a basic tenant of our legal system, and indeed the Constitution, that an individual's privacy cannot be infringed upon absent a significant and proven governmental interest. A documented need for random testing has not yet been established. The same logic applies to governmental involvement in business

decisions. The federal government should only intercede in business affairs when industry has failed to come to terms with a proven problem of national significance. Even then, the remedy should be tailored to reasonably address the problem.

The organized trucking industry has been making measurable strides to improve highway safety. For example, it supported the lowering of the blood alcohol content level at which the driver is considered impaired to .04 from .1 percent. DOT has adopted this recommendation and now truck drivers have a considerably lower permissible alcohol level than that which exists for automobile drivers.

The organized trucking industry also has sponsored and endorsed the establishment of a national commercial drivers license. By 1991, the legislation will ensure that all commercial truck drivers satisfy essential knowledge and driving skills standards. It will also establish a federal safety information clearinghouse to allow the states to track the safety records of drivers and suspend unsafe operators.

The exemption from the federal safety rules of truck operations within large metropolitan commercial zones has also been eliminated, largely due to the efforts of the organized trucking industry.

Moreover, the organized trucking industry has undertaken drug awareness and educational programs, as well as employee assistance programs to help drivers and other employees who are

essential to our productivity and prosperity. We support the Employee Assistance Program requirement established in the DOT drug testing rules.

And our efforts have not stopped there. Voluntarily, the organized trucking companies have instituted various types of drug testing. Management and Teamster labor collectively agreed several years ago to drug testing prior to employment, at the biennial DOT physical, and when there is probable suspicion of drug use. Testing is also permissible when there is reasonable suspicion that drugs or alcohol are a contributing factor to an accident. While these programs are not 100 percent perfect, results over the past few years indicate they are very effective within organized trucking. When a job applicant knows he or she will be tested for drugs before hiring and for suspicious behavior, there is a significant incentive either to stop using them or seek employment elsewhere. Hard-core and frequent drug users will be caught through periodic drug testing.

Of the 31 RCCC organized motor carriers who responded to our survey, twenty-four (78 percent) have drug testing programs in place. All but 2 of the 24 carriers with drug testing programs test for marijuana, cocaine, opiates, amphetamines, and PCP. Several test for other drugs. On average, those motor carriers with drug testing programs have had them in place for 2 to 3 years.

All but one of these 24 carriers with drug testing programs perform pre-employment testing. Most test prior to employment, periodically, and when there is reasonable suspicion. Only one tests drivers randomly.

These motor carriers indicated that about 2 percent of the applicants for driver jobs were rejected in 1987 for refusal to take a company drug test. In 1987, on average only 4 to 5 percent of job applicants for driver positions had to be rejected for evidence of drug use. Furthermore, drug testing programs in the most recent 12 month period have determined a very limited number of drivers are using drugs -- 2 to 3 percent on average.

For several years now private industry has been effectively and increasingly conducting drug tests on job applicants, on drivers during routine physical examinations, and when there is reasonable suspicion to believe that an employee is under the influence of drugs or alcohol. This, to organized trucking is sound business as an unsafe driver not only adversely affects a company's operations, but also poses a significant liability for a company.

The crux of today's drug and alcohol testing issue is whether the government should mandate that all transportation companies randomly test drivers for drug and alcohol use. And more specifically, whether random testing would be a cost-effective approach for improving safety on the highways.

A reasonable answer to these questions can only be reached after a thorough determination of the extent of drug use in the industry; the scope and effectiveness of existing testing programs; and the costs of random testing when compared to its incremental benefits, if any, over and above testing prior to employment, periodically, upon reasonable suspicion, and after an accident.

Problem solving requires a development of the facts and a weighing of alternative approaches. Often, the better approach is to gradually institute measures targeted at the most troublesome areas, learn from experiences, and then proceed with additional measures. This is the sensible approach to determine the appropriateness of random drug and alcohol testing of drivers in the trucking industry.

First and foremost, the government and industry must ascertain the extent of drug and alcohol use by commercial drivers on the road. The proposed federal pilot program of random roadside testing, which the RCCC supports, would produce empirical documentation of the extent of drug and alcohol use by all commercial drivers on the road.

One glaring shortcoming with a program of random testing by employers is that it would not reach a significant portion of the truck driver population. An employer testing program will not reach the several hundred thousand owner-operators who, as independent contractors, do not have employers or only have

transient employers. Obviously, it is neither likely nor practical for an owner-operator to randomly test himself. Furthermore, nearly 70 percent of the known motor carriers operate only one vehicle. These carriers and independents will not be reached by a requirement for random testing by employers. Their limited accountability to anyone but themselves, such as long driving periods during which they are out of reach and control of transient employers, makes it completely unworkable. Moreover, there is no such thing as true random testing for these owner-operators and small carriers since they will select the test time that is most advantageous to them.

In contrast, the proposed federal random roadside testing program would reach all drivers, including owner-operators. It would act both as an effective deterrent to and detector of use by that driving segment of the industry whose work patterns tend to make them more susceptible to on the road impairment due to drug and alcohol use.

A sensible and workable approach to the drug and alcohol issue calls for Congress to allow the organized trucking industry to implement and operate under these four testing procedures -- pre-employment, periodic exam, reasonable suspicion, and post-accident.

Let us better understand and factually know the extent of drug and alcohol use to determine whether the current programs need to be supplemented by additional testing, including random

testing. At this time, however, a requirement of random testing by employers is premature and will not effectively reach a majority of commercial drivers.

As this Committee is aware, the DOT drug testing rules (under injunction) currently require a 50 percent sampling rate. Simply put, this means that one half of all drivers would have to be tested each and every year. If random testing is eventually shown to be necessary, the sampling rate should be lowered considerably -- a ten percent rate would be effective and more appropriate.

If the three million commercial truck drivers were tested at the DOT prescribed sampling rate of 50 percent and at a conservative estimate of \$35 per test, it would cost at least \$52 million each year. This figure does not include costs of second tests, lost time and administrative expenses. This is a very significant expense. A lower sampling rate, ten percent, would still have the significant deterrent effect sought and at a more reasonable cost. The selection of a sampling rate must take into consideration the impact of other testing elements -- pre-employment, periodic exam, post-accident, and reasonable suspicion, all of which provide great disincentive for drug and alcohol use.

IV. REHABILITATION

S.561 should make clear that employers are not required to rehabilitate nor reinstate drug and alcohol users who complete a treatment program. Currently, DOT rules do not require rehabilitation. And for good reason as such a practice would remove a significant impact of the deterrent effect where the employees know they have an automatic right to reinstatement.

A benefit program of rehabilitation and reinstatement should be left to the determination of management and labor. Article 35 of the National Master Freight Agreement between the Teamsters and organized trucking provides an employee a one time leave of absence for up to 60 days for purposes of undergoing drug treatment prior to the commission of any act subject to disciplinary action. During the leave of absence, the employee receives no benefits other than accrual of seniority. Upon return to work, the employee must submit to a drug test.

The employers are allowed under certain circumstances to take disciplinary action based on positive test results. If a laboratory reports that a urine test is positive in a DOT recurrent or regularly scheduled physical examination, the employee is subject to discharge. However, the employee is reinstated on a one-time basis if he or she successfully completes a program of evaluation and, if necessary, treatment as provided by the applicable Health and Welfare fund. Any cost

over and above that fund's contribution must be borne by the employee. During treatment, the employee does not receive any benefits, other than accrual of seniority. Upon reinstatement, the employee is subject to three additional tests without notice within 12 months.

If a laboratory reports a blood test positive in a probable suspicion test, the employee shall be subject to discharge. No treatment or rehabilitation need be offered.

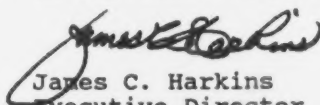
In sum, the organized trucking companies who are parties to the National Master Freight Agreement have three categories of action. First, employees who voluntarily admit to drug abuse and submit to treatment are not discharged. They have a one time exception. Second, those employees who test positive for drugs during a DOT or periodic physical are also entitled to treatment and rehabilitation for a first offense at their own expense. Finally, those who test positive from a "blood sample" during a probable suspicion test can be discharged immediately.

The RCCC believes that the issue of rehabilitation should be left to private industry. Although we believe that is the intent of the bill, the matter should be more forcefully conveyed. The discretion given to the Secretary, as well as the preamble recitation about "rehabilitation being a critical component of any testing program... and should be made available to individuals, as appropriate," leaves some doubt about the matter.

V. INTRASTATE OPERATORS

The current DOT drug testing rules do not apply to intrastate drivers. This creates a very significant gap in the rules' effectiveness since a considerable amount of trucking operations occur within states. To avoid making in-state operations a dumping ground for unsafe drivers, S.561 should clearly provide that the testing requirements apply to intrastate motor carriers.

Respectfully submitted



James C. Harkins
Executive Director
REGULAR COMMON CARRIER CONFERENCE
Suite 350
2200 Mill Road
Alexandria, Virginia 22314
(703) 838-1971

DATED: June 23, 1989



Legislative Affairs

ASSOCIATION OF FLIGHT ATTENDANTS  AFL-CIO

1625 Massachusetts Ave. N.W., Washington, D.C. 20036 (202) 328-5400 FAX (202) 328-5424

ASSOCIATION OF FLIGHT ATTENDANTS, AFL-CIO, OPPOSES RANDOM DRUG TESTING FOR FLIGHT ATTENDANTS AND OTHER AMERICAN WORKERS

The Association of Flight Attendants, AFL-CIO, the largest flight attendant union in the U.S. representing 25,000 flight attendants at 19 airlines, strongly opposes S. 561. While we support the goal of diminishing the significant danger alcohol and drug abuse poses to the safety and welfare of our nation, we oppose actions that will not correct the problem but instead will threaten an individual's reputation or career without just cause.

Drug and alcohol testing of flight attendants is unnecessary as there is no evidence in all of aviation history of a safety hazard caused by a flight attendant under the influence of drugs or alcohol. As such, the costs of legislation like S. 561, both in dollars and in loss of privacy, greatly outweigh any benefits that might be achieved.

Moreover, drug testing of flight attendants is hypocritical in light of the Federal Aviation Administration's recent denial of a petition that would limit flight attendant duty time and require minimum rest time. It is ironic that flight attendants will be tested for sleep-inducing drugs, while at the same time allowing them to work 24 hours in a row.

With the implementation of adequate safeguards, we do not oppose pre-employment, periodic recurring, post-accident, reasonable suspicion or post rehabilitation testing. However, we cannot accept an unwarranted erosion of our Constitutional rights that is posed by random testing.

Protecting the civil liberties of individuals in a free society is fundamental to the American system of government. Our Constitution specifically provides protection against unreasonable searches and seizures in the Fourth Amendment.

Random testing is, by definition, a search. And it is, by definition, unreasonable because there is no individualized suspicion on which it is based. In the words of Judge Sarokin, ruling in favor of firefighters who had been discharged based on positive drug test results: "If we choose to violate the rights of the innocent in order to discover and act against the guilty, then we have transformed our country into a police state and abandoned one of the Constitution in the battle."

At a time when the Soviet Union, China and Poland are inching ever closer to democratic principles long cherished by Americans, it would be tragic for a revered American institution, the United States Senate, to sound a trumpet call of retreat on fundamental individual liberties in this country.

At the Association of Flight Attendants, we have been constructively addressing the problem of drug abuse for almost ten years. In 1980, with support from the National Institute on Alcohol Abuse and Alcoholism, AFA set up its Employee Assistance Program (EAP). Our EAP addresses not only substance abuse but also intervention and referral for situations which could lead to substance abuse. The careers and reputations of troubled flight attendants are protected from undue threats or harm through the process of peer intervention, referral to rehabilitation and ultimately return to the work force as productive and effective employees.

We believe that the answer to alcohol and drug addiction is to help our members, not harass them. We are extremely concerned that our members, who are taking medication prescribed for specific illnesses, may be discriminated against because there is no guarantee of confidentiality for them. We are fearful that medical information will not be confidential and that private medical information will be requested on medical forms. Under the provisions of S. 561, there is no mechanism mandating an employee's right to retain a portion of the original sample for independent analysis if necessary.

S. 561 sends the wrong message to America. We must stop drug and alcohol addiction but not at the expense of our Constitution and the rights of American workers. The Association of Flight Attendants urges the defeat of S. 561.

STATEMENT OF
THE AIR TRANSPORT ASSOCIATION OF AMERICA
BEFORE THE COMMITTEE ON
COMMERCE, SCIENCE AND TRANSPORTATION
ON S.561
DRUG AND ALCOHOL ABUSE IN TRANSPORTATION
HEARING DATE: JUNE 15, 1989

We are pleased to offer the views of the scheduled airline industry on this most recent legislative proposal addressing unlawful drug and alcohol use in the aviation industry. ATA's members account for approximately 97% of the revenue passenger miles flown annually in the United States. ATA members also account for approximately the same percentage of cargo traffic. Without question, the American public relies on the experience, judgment and skill of our employees. There can be no compromise where drugs or alcohol are concerned. The flying public is entitled to a substance-free aviation work force.

Our statements from prior appearances before this Committee on this subject have focused on and advocated strong regulations concerning unlawful use of drugs. In fact, attached to our statement of February 20, 1987 was a detailed regulatory proposal prohibiting unlawful use of drugs, and requiring that employees in safety-sensitive positions be subject to several types of testing, including random drug testing.

Part of the debate at that time concerned the Federal Aviation Administration's authority to issue regulations requiring airlines to test their employees for illegal drug use. It was our view then, as it is now, that the FAA has adequate statutory authority to issue such regulations, and that the appropriate way to address substance abuse is through informal rulemaking by the FAA. The regulatory process is well suited to allow for the deliberate and

careful consideration of all of the details attendant to regulating individual conduct, and all of the competing arguments about the ramifications of those details, in developing prudent and effective solutions.

We were extremely gratified that the FAA ultimately agreed with our view and issued comprehensive anti-drug use regulations last November. In our opinion, these regulations accomplish the specific goals of this Committee, and upon their full implementation will result in reduced use of illicit drugs in the airline industry by covered employees.

Our experience with the FAA's anti-drug use rule leads us to conclude that the FAA has the statutory authority, the technical expertise and the administrative ability to develop appropriate regulations, in addition to those already existing, concerning the unauthorized use of alcohol. We would fully expect such regulations to include a requirement for appropriate testing of employees for unauthorized use of alcohol. And, as we recommended in our comments on the anti-drug use rule, we would expect an opportunity for rehabilitation to be offered only to those employees who come forward voluntarily to seek help.

Because alcohol can be lawfully obtained and used, it is extremely important that regulations which limit its use and authorize employee testing be carefully drawn. Also, the question of whether, or when, to authorize drawing blood from employees is one which was not faced in the anti-drug use rules. This question raises extremely complicated legal and policy issues. The

FAA has shown that it can deal with these, and other, controversial issues in a manner which both promotes the interests of safety and protects individual rights.

ATA supports the social concerns which are the underpinnings of S.561, and we would support legislation confirming the FAA's authority to regulate in this area, even though we continue to believe that the FAA already has that authority. Moreover, by its consideration of S. 561 and other similar bills, this Committee has once again signaled to the FAA -- indeed, to all of the operating administrations under the Department of Transportation -- the importance of this issue.

The debate among the members of this Committee offers clear guidance to the FAA, and other Federal agencies, in crafting appropriate alcohol use regulations. However, given the FAA's adoption of stringent anti-drug use rules, and in light of Secretary Skinner's intention to initiate a new rulemaking with respect to alcohol use, we believe the type of detailed requirements contained in S.561 are unnecessary. We respectfully urge this Committee to allow the FAA to proceed with its plans to develop appropriate alcohol use regulations without laying down detailed, specific requirements.

Thank you for the opportunity to submit these views.

Independent Truckers & Drivers Association

P.O. BOX 9646

BALTIMORE, MARYLAND 21237

1109 Plover Drive
Baltimore, Md. 21227

June 8, 1989

The Honorable Ernest F. Hollings
Chairman
Committee on Commerce, Science and
Transportation
U.S. Senate
Washington, D.C. 20510

Dear Chairman Hollings,

We are writing to express the views and concerns of this Association's members regarding the use of drugs by transportation workers. We also want you to know that we believe that most truckers are willing to submit to drug testing in order to help bring about a drug-free transportation system. In the past two years, we have talked with truckers from all over the country. The most frequent response we hear from truckers is "I am willing to be tested for drugs if that's what it takes to get the drug users off the highways." These truckers are not worried about an invasion of privacy or their individual rights. They are more concerned about protecting the rights of all drivers to be able to use the highways without being worried about facing a driver who is a drug user.

Because of reports that many truckers oppose drug testing, this Association conducted a survey of several hundred persons who attended the East Coast Truck Show in Baltimore during mid-March. The following is a summary of the survey results:

- 87.9 percent said truckers should be tested for drugs.
- 93.3 percent said they are willing to be tested.
- 59.7 percent opposed roadside testing.
- 73.1 percent would agree to be tested at their home terminal.
- 90.0 percent said truckers should be tested if they are involved in a serious traffic accident.
- 96.5 percent said if truckers are tested after an accident, the other involved drivers should also be tested.

A total of 83.3 percent of the survey participants drive a truck, the remainder of the participants are either a truck driver's

spouse or a company owner or trucking company employee. This survey is, we believe, an accurate snapshot of truckers' true feelings toward drug testing.

While our survey does not specifically address the question of the validity of roadside tests, we have reason to believe that many truckers are concerned about roadside tests. As you will see by our survey findings, more than half of the respondents do not favor roadside testing. Some truckers have expressed the concern that roadside testing would increase the potential for harassment. But the largest concern is that roadside testing will not present the most favorable conditions for detecting drug use. As one possible alternative, we have suggested that random testing could be conducted at the home terminal.

We regret that we were unable to secure a place on the witness list at your Committee's upcoming hearing on drug testing. We are, however, asking that you put this letter in the record of the hearing.

We would be pleased to be of assistance to you and your Committee in connection with drug testing or any other truck or highway safety matter.

Yours truly,



Rita Bontz
President, Independent Truckers and
Drivers Association

National Association of Regulatory Utility Commissioners

Incorporated

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Telephone: 202-396-2229
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PAUL RODGERS
Administrative Director
General Counsel

CHARL ARGIRO
Treasurer

June 15, 1989

Honorable Ernest F. Hollings
Chairman
Committee on Commerce, Science & Transportation
United States Senate
Washington, D.C. 20510

Re: Statement for the Record of June 15
Committee Hearing on S. 561

Dear Chairman Hollings:

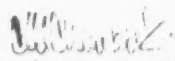
On behalf of the National Association of Regulatory Utility Commissioners (NARUC), which represents the State regulators of railroads and motor carriers, we respectfully request that this letter and the enclosed NARUC policy resolution be included in the formal record of the hearing referenced above.

The NARUC has not taken a formal position on S. 561 or any other drug testing legislation in the 101st Congress. However, the NARUC fully supports rules proposed by the Federal Department of Transportation that provide for testing of commercial motor vehicle drivers for drug use: before being employed by a company as a driver; during required routine physicals; following all accidents; and when law enforcement officials or employers have reasonable cause to believe the driver has used or is possessing illegal drugs. Our policy also supports the development and implementation of a random road-side drug testing pilot program, which will enable law enforcement officials and truck inspectors to test commercial motor vehicle operators for drug use.

Please feel free to contact us if you have any questions.

Sincerely,


Paul Rodgers
General Counsel


Caroline M. Chambers
Director, Congressional
Relations

Enclosure

American Petroleum Institute
1220 L Street, Northwest
Washington, D.C. 20005
202-682-8100



Charles J. DiBona
President

July 11, 1989

The Honorable Ernest F. Hollings
Chairman
Committee on Commerce, Science, and Transportation
United States Senate
Washington, DC 20510-6125

Dear Mr. Chairman:

The American Petroleum Institute (API) welcomes this opportunity to provide its views on S. 561 concerning testing for the use of alcohol or controlled substances by aircraft, railroad, and commercial motor vehicle operators.

API represents over 200 companies involved in all aspects of the oil and natural gas industry, including exploration, production, transportation, refining, and marketing. API member companies own and operate private fleets of commercial motor vehicles and, as shippers, consign products to both contract and common carrier trucking companies. Because of this involvement with the operation of commercial motor vehicles, API has a direct interest in your proposed bill.

API participated in the U.S. Department of Transportation (DOT) rulemaking process for the four modal final rulemakings and the interim final rule on procedures for transportation workplace drug testing programs issued November 21, 1988. The Institute also filed an amicus curiae brief in the related U.S. Supreme Court case, Burnley v. Railway Labor Executives' Association. API member companies are now preparing to comply with the drug testing requirements promulgated by the Federal Highway Administration (FHWA) by the December 21, 1989 deadline.

API's extensive participation in the rulemaking process reflects our concern over the safety of our employees in the work environment and of all who use the nation's highway system.

As mentioned, the U.S. Department of Transportation has begun the process of mitigating drug use by vehicle operators in the trucking industry. FHWA has, however, restricted the application of its final rule to motor carriers who operate commercial motor vehicles in interstate commerce. We believe these rules should apply to all commercial vehicle operators and therefore support the approach taken in S. 561. By using the definition of "commerce" in the Commercial Motor Vehicle Safety Act of 1986,

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efforts to eliminate drug and alcohol abuse will apply to all carriers, not just to interstate motor carriers. Drug and alcohol abusers and the accidents they cause do not recognize the difference between intrastate and interstate commerce.

Controlled Substance Testing Programs (Other Than Alcohol)

S. 561 would mandate four types of controlled substance testing programs (preemployment, periodic, post-accident, and reasonable cause) for the motor carrier industry and a pilot random testing program.

API supports preemployment testing of driver-applicants; periodic tests of all operators; post-accident testing of operators when ordered by the law enforcement officer at the scene; and testing of drivers upon the basis of reasonable cause, as determined by the employer, for controlled substances other than alcohol. API also supports the pilot random testing program, but believes that a federal mandate for random testing should not be implemented until the results of this pilot program are fully evaluated.

While, API supports post-accident testing, we oppose the requirement that the motor carrier be responsible for conducting such tests. We believe that post-accident testing of a truck driver or other party in an accident is a necessary component of a drug testing program when there is an indication that substance abuse caused or contributed to the accident. However, the decision whether or not a test is appropriate is best made by a law enforcement officer at the scene. The FHWA final rule on drug testing specifies that the driver, rather than the motor carrier, is responsible for ensuring that a urine sample is provided or that there is necessary authorization for obtaining hospital reports or other documents indicating whether any drugs were in the driver's system. We support placing the responsibility on the driver rather than the motor carrier since the motor carrier frequently may not be informed on a timely basis of an accident involving injuries or fatalities.

API supports the pilot program as described in S. 561 as an appropriate next step in examining the efficacy of random testing programs for drugs and alcohol. A pilot random testing program would assist in identifying solutions for the problems associated with random testing. Some of these problems are logistical and are a function of who is required to conduct the test. If the motor carrier is responsible for conducting testing, employees who are selected by a random process must be located within the transportation system in order for testing to be accomplished. For over-the-road trucking operations, an employee may be far from his home terminal or far from any facility able to conduct the test. In addition, the procedures for conducting drug

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Ernest F. Hollings
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testing include considerations for personal privacy and chain-of-custody requirements for which an employer is responsible. Ensuring that these requirements are met is difficult at remote locations. We believe the pilot program should include roadside random testing conducted by law enforcement personnel.

Alcohol Testing

S. 561 would mandate four types of alcohol testing programs (preemployment, periodic, post-accident, and reasonable cause) for the motor carrier industry and a pilot random testing program.

API supports post-accident testing of operators when ordered by the law enforcement officer at the scene and testing drivers upon the basis of reasonable cause, as determined by the employer, for alcohol. API also supports the pilot random testing program, but believes that a federal mandate for random testing should not be implemented until the results of the pilot program are fully evaluated. We oppose preemployment and periodic testing for alcohol.

While API supports post-accident testing for alcohol, we have the same concerns related to the responsibility for such testing as described in our comments on controlled substance testing programs.

Our comments as described in the previous section on controlled substances are equally applicable to a pilot random testing program for alcohol.

API does not believe that the requirement for employers to conduct preemployment or periodic tests for alcohol will make a significant contribution to safety or to the elimination of employee alcohol abuse. Individuals -- even those who are chronic alcohol abusers -- may refrain from use long enough to pass preemployment and periodic tests for the presence of alcohol.

Programs for Rehabilitation

API supports the concepts described in S. 561 for identifying and providing an opportunity for treatment of operators who are determined to have used alcohol or a controlled substance. We believe that providing rehabilitation for employees should remain the prerogative of the private employer. The employer should determine the terms of any rehabilitation offered and who should be rehabilitated. Rehabilitation is a benefit that an employer chooses to offer to employees -- or a program to be negotiated

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with labor. Many API member companies offer rehabilitation programs to employees who come forward voluntarily for treatment of alcohol or drug abuse. Recognizing that alcohol or drug abuse is a health problem which is treatable, many companies provide assistance to affected employees similar to the help offered for other illnesses. These company programs vary in terms of scope of coverage, eligibility requirements, post-rehabilitation testing, and handling of recurring drug or alcohol problems.

Procedures for Testing

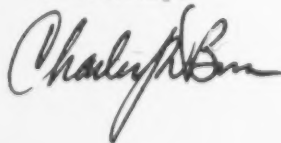
S. 561 specifically incorporates the U.S. Department of Health and Human Service's scientific and technical guidelines for drug testing. We do not believe that these guidelines have had adequate public review and should be subjected to additional scrutiny before they are mandated.

The guidelines were published by DOT on November 21, 1988 as an interim final rule entitled, "Procedures for Transportation Workplace Drug Testing Programs." Through comments to DOT, API has expressed concern that the HHS guidelines neither consider the unique operating characteristics of the transportation industry nor address multi-faceted testing programs as defined in S. 561. As initially proposed, these guidelines were only to be applied to federal workers and in-house federal government testing programs. The broader application now provided for indicates the need for more extensive public review and comment. A copy of our comments to the Department of Transportation concerning the HHS guidelines is provided as an attachment to this letter.

It should be noted that the HHS guidelines cover urine testing for specific illegal drugs. These guidelines do not address testing for alcohol.

API appreciates the opportunity to provide these comments to the committee.

Sincerely,





Amalgamated Transit Union

5025 Wisconsin Ave., N.W., Washington, D.C. 20016-4139
202-537-1645

Office of the International President

June 21, 1989

The Honorable Ernest F. Hollings
Chairman, Senate Committee on Commerce,
Science and Transportation
330 Hart Senate Office Building
Washington, DC 20510

Dear Senator Hollings:

The Amalgamated Transit Union, on behalf of its membership employed in the urban mass transit, inter-city and school bus industries, submits this statement in response to the Committee's request for our views on S.B. 561 as it affects commercial motor vehicle operators. As drafted, S.B. 561 would mandate the unilateral imposition of pre-employment, periodic screening, random, post-accident and reasonable suspicion drug and alcohol testing of transportation industry employees.

We continue to be in serious disagreement with the Committee over the need for new federal legislation mandating both drug and alcohol testing of commercial motor vehicle operators. We share your desire to promote the safety of the riding public which should be of paramount concern to all involved in the transportation industry. We believe our own commitment to safety is second to none, and we are proud of the leadership ATU locals have shown in negotiating testing and treatment programs which have effectively addressed substance abuse problems in the work place.

For over twenty years, this union and its locals have supported and negotiated programs designed to keep the work place free of drug or alcohol impaired workers, who in our view should be removed from service until they can be properly treated and rehabilitated. The ATU has pioneered in the development of negotiated "Employee Assistance Programs" (EAP's) which stress rehabilitation, education and reemployment as effective alternatives to unilateral employer testing and termination. These programs have served to establish and maintain a highly trained, safe and disciplined work force.

As a result, both the mass transit and over-the-road bus industries have carefully designed, cost-effective substance abuse programs already in place to combat drug and alcohol impairment of bus and other transit vehicle operators. Some 75% of the 140 bus oriented systems responding to a 1987 urban transit industry survey reported that they have adopted written rules and policies designed

INTERNATIONAL UNION OF



Affiliated with American Federation of Labor and Congress of Industrial Organizations,
and Canadian Labour Congress

The Honorable Ernest F. Hollings
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to eliminate drug and alcohol abuse among their employees, many of which include employee assistance programs as a key component of their plans. The record in the over-the-road bus industry also indicates that most bus operators, including those of the Greyhound Corporation, are subject to pre-employment, reasonable suspicion and post-accident testing, and that they are working under specific rules providing for discipline and/or discharge for job impairment due to the use of alcohol, drugs or other illegal substances. Existing DOT regulations also mandate that those operators undergo medical examinations every two years during which the examining physician is required to certify the driver free from evidence of drug abuse.

Current statistical evidence gathered by the federal regulatory agencies to date and other studies have shown that the safety record within the urban mass transportation industry is commendable and has steadily improved over the last five years. The Urban Mass Transportation Administration's own 1987 "Safety Review Task Force," in calling urban transit one of the safest transportation modes, noted the industry's exemplary record of a 15% decline in accidents and no increase in passenger fatalities over the 1979 - 1984 period under review. The data gathered under Section 15 of the Act concerning passenger miles operated and the accident/fatality ratio also support this view. Indeed, in issuing their recent drug testing regulations neither the Federal Highway nor the Urban Mass Transportation Administration was able to cite any specific evidence to support the existence of a drug abuse problem in the intercity or urban transit industries warranting a new national effort. In fact, UMTA noted that "[n]o data exists to prove the presence of a drug or alcohol abuse problem among mass transit personnel." (53 Fed. Reg. at 25, 913) FHWA simply "assumed" the existence of a drug abuse problem as warranting national regulation. (53 Fed. Reg. 22, 268)

In light of these industries' long standing commitment to safety, and as further outlined below, we fail to understand the necessity to legislate a massive new federal program of extraordinary expense to the parties affected. To justify such an intrusion into the privacy of the hundreds of thousands of employees leading drug free lives who would be adversely affected by this legislation, at least some factual showing of a serious substance abuse problem beyond present voluntary efforts by the parties to control must be demonstrated.

The specifics of our objections to S.B. 561 may be briefly summarized as follows: First, as above described, we continue to believe that ongoing union/industry efforts in the urban mass transit and over-the-road bus industries, coupled with the new regulatory requirements issued under the Commercial Motor Vehicle Safety Act of 1986 (CMVSA '86), including the strict "blood-alcohol

The Honorable Ernest F. Hollings
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content" standards and penalties, have already comprehensively addressed substance abuse problems among commercial motor vehicle operators and obviated any need for new legislative and/or regulatory requirements. Regulations issued under this Act, administered by state and local law enforcement agencies, established a uniform zero tolerance for alcohol and will serve to immediately remove from service operators convicted of operating while impaired. Further, the imposition of mandated alcohol testing raises many significant and as yet unanswered questions, concerning, methodology, testing procedures, training, laboratory availability and other legal areas that should be more fully explored by the Committee before pursuing specific legislation.

Second, we consider the bill's provisions mandating random testing as an unconstitutional and unwarranted invasion of employee rights. Only when all other less intrusive methods have failed and an emergency exists, can such a scattergun approach be deemed appropriate.

Third, the recently issued Department of Transportation regulations affecting commercial motor vehicle operators in the urban mass transit and over-the-road bus industries already provide for pre-employment and promotion or transfer testing; post-accident testing of employees whose performance could have been a contributing factor; periodic testing for employees subject to federally mandated exams; reasonable cause testing based upon observed employee behavior; and random drug testing. While these regulations are being challenged in court,^{1/} principally on the constitutionality of random drug testing, it would be premature for the Committee to mandate such testing. Guidance from the Courts may also be forthcoming on related legal issues including the industry-specific record necessary to support mandatory testing and the identification of those classifications of employees who may properly be subjected to such requirements. Obviously the Courts' decisions in these cases would serve to provide this Committee with a specific legal framework within which to draft any subsequent legislation that may be necessary. It makes no sense

^{1/}On December 23, 1988, and January 11, 1989, the ATU filed complaints, respectively challenging the legality of UMTA and FHWA drug testing regulations. The UMTA case is pending in the United States District Court of the District of Columbia (ATU v. Skinner, No. 88-3642-LFO), while the FHWA case was recently consolidated with related cases and transferred to the United States Court of Appeals for the Ninth Circuit (ATU v. U.S. Department of Transportation, No. 89-70166, D.C.# CV-89-0081-MHP, Northern California (San Francisco)). Decisions on these matters are expected by December 1989.

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to rush ahead with further overlapping initiatives until the impact and legality of these regulations are tested.

Fourth, in statements filed with the responsible federal agencies, we have also pointed out other deficiencies in these regulations, such as their failure to mandate rehabilitation opportunities and job retention pending rehabilitation for employees testing positive, especially in light of expert evidence describing their importance in establishing effective industry programs; the absence of certain employee privacy and other laboratory safeguards; and the failure to include mandatory requirements for comprehensive education and training of both employees and supervisors subject to the regulatory requirements. Senate Bill 561 is similarly silent on these issues. Attached hereto for your consideration are copies of our September 6 and 13, 1988 statements to the Department of Transportation raising these concerns which apply with equal validity to the pending legislation.

Finally, the bill's failure to integrate into its requirements existing collectively bargained testing and rehabilitation programs and to recognize employee rights to negotiate over testing, EAP's and related issues are serious omissions, especially in light of the substantial success such programs have had within the affected industries. As a matter of federal and state law, we believe that in most instances the employers in our industries are prohibited from unilaterally implementing random and other forms of federally mandated testing prior to satisfaction of the bargaining requirements imposed by the National Labor Relations Act or by other bargaining laws applicable to the public sector.

As you know, legislation is currently pending before the House Energy and Commerce Committee (H.R. 1208) seeking to establish mandatory drug and alcohol testing requirements for employees in the railroad industry. Aside from the requirements for random drug testing, which we oppose, that legislation does include comprehensive rehabilitation requirements and re-employment opportunities for employees initially testing positive; it allows for the negotiation and implementation of collectively bargained programs and requirements. These are necessary safeguards which this Committee should use as a model for the drafting of similar provisions to be included in any final version of a bill mandating testing for commercial motor vehicle operators.

In conclusion, the Amalgamated Transit Union strongly believes that the most effective way of dealing with substance abuse problems as they arise in the work place is to establish negotiated plans and policies which carefully address the issues unique to the particular local environment and concerns. In this fashion, the appropriate remedies, due process protections and other safeguards

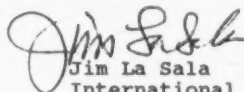
The Honorable Ernest F. Hollings
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Page 5

can be put in place by the parties. Clearly, existing Department of Transportation regulations under the CMVSA '86, negotiated testing and Employee Assistance Programs, coupled with the mandatory penalties imposed on employees convicted of substance abuse, fully address the Committee's safety concerns. Additional legislation at this time is not warranted and would be unwise and exceedingly costly.

Should the Committee, however, proceed with its proposed legislation, we stand ready to meet with and work with you to insure that an effective bill is drafted which will enhance the existing safety programs in the surface transportation industries.

Thank you for the opportunity to submit these comments.

Sincerely,



Jim La Sala
International President

/rfm
Enclosures 1/

1/ The enclosures were not reproducible and are in the Committee files.